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No. 07-_____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

TSA STORES, INC.,
Petitioner,

v.

FLORIDA DEPARTMENT OF AGRICULTURE
AND CONSUMER SERVICES
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Florida

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

A Florida appeal court ruled that a federal law, the Telephone Consumer Protection Act of 1991 ("TCPA", 47 U.S.C. § 227), does not preempt application of a conflicting state law, Florida Statute § 501.059, to Petitioner's interstate telephone calls. The Florida Supreme Court declined to hear this case. Does the TCPA, or the regulation implemented by the FCC pursuant to the TCPA, preempt, or has Congress or the Federal Communications Commission ("FCC") otherwise preempted, Florida Statute § 501.059 barring Petitioner's prerecorded interstate telephone calls?

PARTIES

The caption to this case contains the names of all the parties.

CORPORATE DISCLOSURE STATEMENT

The parent corporation of TSA Stores, Inc. (hereinafter "Sports Authority") is The Sports Authority, Inc. which is wholly owned by Slap Shot Holdings Corp. TSA Stores, Inc., The Sports Authority, Inc., and Slap Shot Holdings Corp. are Delaware corporations. There is no public entity that owns 10% or more of TSA Stores Inc.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	vii
CITATIONS OF OPINIONS AND ORDERS BELOW	1
STATEMENT OF JURISDICTION	2
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	3
ARGUMENT: REASONS FOR GRANTING THIS PETITION	6
I. THE FLORIDA COURT OF APPEAL HAS RULED ON AN IMPORTANT QUESTION OF FEDERAL LAW NOT YET SETTLED BY THIS COURT	7
A. The intent of the United States Congress and FCC is clear—interstate telephone calls are to be regulated solely by federal law	8
B. This Court has ruled that the Telecommunications Act and the FCC can preempt state law as applied to interstate calls	13
II. THE FLORIDA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS BY COURTS IN OTHER JURISDICTIONS	15

TABLE OF CONTENTS—Continued

Page

A. California, Ohio and Texas courts have ruled that the TCPA preempts state law as applied to interstate calls 15

1. California—*Chamber of Commerce of the United States of America v. Bill Lockyer* ruled that the TCPA preempts state law as applied to interstate telephone calls 15

2. Ohio—*Charvat v. Telelytics, LLC* ruled that the TCPA preempts state law to the extent it frustrates national regulation of topics regulated by the TCPA..... 17

3. Texas—*Omnibus International, Inc. v. AT&T, Inc.* ruled that states have no independent regulatory authority over interstate telephone calls..... 18

B. Decisions in the states of Indiana, Minnesota, North Dakota and Utah have held that the TCPA does not preempt state law as applied to interstate calls 19

1. Indiana—In *FreeEats.com, Inc. v. State of Indiana* the court ruled that federal law did not preempt state law 19

TABLE OF CONTENTS—Continued

Page

2. Minnesota—*Van Bergen v. State of Minnesota* ruled that the TCPA did not preempt state law 20

3. North Dakota—*State of North Dakota ex rel. v. FreeEats.com, Inc.* ruled that the TCPA did not expressly preempt state laws applied to interstate telephone calls 21

4. Utah—*Utah v. Flagship Capital* ruled that the TCPA did not preempt state laws applied to interstate calls 22

C. Two U.S. district court cases, including the federal court which remanded this matter back to state court, have held that the TCPA does not "completely preempt" state law 22

III. NEED FOR SUPREME COURT RESOLUTION 23

APPENDIX A 1a

APPENDIX B 3a

APPENDIX C 7a

APPENDIX D 20a

APPENDIX E 25a

APPENDIX F 31a

TABLE OF CONTENTS—Continued

	Page
APPENDIX G	43a
APPENDIX H	44a
APPENDIX I	64a
APPENDIX J	73a
APPENDIX K	89a

TABLE OF AUTHORITIES

CASES	Page
Chair King, Inc., v. Houston Cellular Corp., 131 F.3d	18, 19
Chamber of Commerce of the United States of America v. Bill Lockyer, 2006 U.S. Dist. LEXIS 8324 (E.D. Cal. 2006)	*passim*
Charvat v. Telelytics, LLC, 2006 Ohio 4623 (Ohio Ct. App. 2006)	17
Erienet, Inc. v. Velocity Net, Inc., 156 F.3d 513 (3rd Cir. 1988)	20
FreeEats.com v. State of Indiana, ex rel. Steve Carter, 2006 U.S. Dist. LEXIS	19, 20
La. Pub. Serv. Comm'n v. FCC, 476 U.S. 355 (1986)	13, 16
North Dakota v. Debt Management Foundation Services, Inc., Case No.: 5:03-CV-950-FL(3) (E.D.N.C. 2004)	23
Omnibus International, Inc. v. AT&T, Inc., 111 S.W.3d 818 (Tex. App. 2003) 77534 (S.D. Ind. 2006)	18
Poller v. Columbia Broadcasting System, 368 U.S. 464, 473 (1962)	4
State of Florida Department of Agriculture and Consumer Services v. The Sports Authority Florida, Inc., a Florida Corporation, Case No. 03-CA-10535, Circuit Court for Orange County, Florida	1, 2

TABLE OF AUTHORITIES—Continued

Page

State of Florida, Department of Agriculture and Consumer Services v. The Sports Authority, Inc., United States District Court, Middle District of Florida, Orlando Division, Case No.: 6:04-cv-115-Orl-JGG 2, 23

TSA Stores, Inc., a Delaware Corporation v. Department of Agriculture and Consumer Services, District Court of Appeal of the State of Florida, Fifth District, Case. No.: 5D06-1775 2

TSA Stores, Inc., etc. v. Florida Department of Agriculture and Consumer Services, Case No.: SC07-1101, Supreme Court of Florida 1

Utah Division of Consumer Protection v. Flagship Capital, 125 P.3d 894 (Utah 2005) 22

Van Bergen v. State of Minnesota, 59 F.3d 1541 (8th Cir. 1995) 20, 21

STATUTES

28 U.S.C. § 1257 2

47 U.S.C. § 153 11

47 U.S.C. § 227 ..... *passim*

Florida Statute § 501.059 ..... *passim*

REGULATIONS

FCC Regulations implementing the TCPA, 47 C.F.R. § 64.1200 ..... 3, 8

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS — Page

137 Cong. Rec. S. 16204 10

137 Cong. Rec. S. 18781 10

U.S. Constitution, Article VI § 2 3

OTHER

Report & Order, Federal Communications Commission, CG Docket No. 02-278, July 3, 2003 12

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Final Judgment and Permanent Injunction After Remand – *State of Florida Department of Agriculture and Consumer Services v. The Sports Authority Florida, Inc., a Florida Corporation*, Case No. 03-CA-10535, Circuit Court for Orange County, Florida, February 18, 2008. App. 3a.

Order - *TSA Stores, Inc., etc. v. Florida Department of Agriculture and Consumer Services*, Case No.: SC07-1101, Supreme Court of Florida, December 13, 2007. App. 1a.

Order - *TSA Stores, Inc., a Delaware Corporation v. Department of Agriculture and Consumer Services,* District Court of Appeal of the State of Florida, Fifth District, Case. No.: 5D06-1775, April 20, 2007. App. 7a.

Final Summary Judgment and Permanent Injunction - *State of Florida, Department of Agriculture and Consumer Services v. The Sports Authority Florida, Inc., a Florida Corporation,* Circuit Court for Orange County, Florida, Case No.: 03-CA-10535, April 11, 2006. App. 20a.

Order on Motion for Summary Judgment and Permanent Injunction - *State of Florida, Department of Agriculture and Consumer Services v. The Sports Authority Florida, Inc., a Florida Corporation,* Circuit Court for Orange County, Florida, Case No.: 03-CA-10535, October 31, 2005. App. 25a.

Order - *State of Florida, Department of Agriculture and Consumer Services v. The Sports Authority, Inc.,* United States District Court, Middle District of Florida, Orlando Division, Case No.: 6:04-cv-115-Orl-JGG, June 4, 2004. App. 31a.

STATEMENT OF JURISDICTION

The Florida Supreme Court declined jurisdiction over an Order of the Florida Court of Appeal, Fifth Circuit, by Order dated December 13, 2007. This Court has jurisdiction over this case pursuant to 28 U.S.C. § 1257(a) as the decision rendered is in the highest state court where a decision could be had. The circuit court issued a Final Judgment and Permanent Injunction After Remand dated February 18, 2008, implementing the decision of the Florida Court of Appeal. App. 3a.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Constitutional Provisions

U.S. Constitution, Article VI § 2 reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Statutes

The Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227. App. 44a.

Florida Statute § 501.059. App. 64a.

Regulations

FCC Regulations implementing the TCPA, 47 C.F.R. § 64.1200. App. 73a.

STATEMENT OF THE CASE

Petitioner respectfully submits this Petition for a Writ of Certiorari to the Supreme Court of Florida to review the judgment of the Florida Court of Appeal, Fifth District, which the Florida Supreme Court declined to review.

The facts of this case are simple and uncontested. Respondent Florida Department of Agriculture and Consumer Services ("Florida") sued Sports Authority alleging 77 violations of Florida's state do-not-call list (Florida Statute § 501.059(4)) and 73 violations of

Florida's ban on prerecorded telephonic sales calls (Florida Statute § 501.059(7)). App. 27a-28a. Sports Authority hired a third party in California to place these calls to consumers who had made a purchase from a Sports Authority store in the 18 months preceding the call, and who had not otherwise made a do-not-call request to Sports Authority. *Id.* It is uncontested that these interstate calls complied with the applicable federal TCPA and the FCC's regulation implementing that law. Florida moved for summary judgment which was issued by the circuit court in two different rulings. Because the circuit court issued summary judgment in this matter, these facts are to be viewed in a light most favorable to Sports Authority. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962).

This is an appeal of a decision by the Florida Court of Appeal, Fifth District, which the Florida Supreme Court declined to review. That appellate court ruled that the TCPA did not preempt contrary state law as applied to Sports Authority's interstate prerecorded telephone calls. The appellate court decision overturned in part and upheld in part Summary Judgment Orders of the Circuit Court of Orange County, Florida. The Florida Supreme Court's Order is dated December 13, 2007 and denies any request for rehearing. App. 1a. The circuit court issued its final judgment in accordance with the appellate court decision on February 18, 2008. App. 3a.

The question presented for review, i.e. TCPA preemption of conflicting state law as applied to interstate calls, was raised at each stage of this case including circuit court, appellate court, and the request for hearing by the Florida Supreme Court. Please see App. 9a which documents Sports Author-

ity raising the preemption argument at the United States District Court level. In response to Florida's summary judgment motion, Sports Authority again raised the preemption argument. App. 11a.

Sports Authority also raised this argument for the appeal court, App. 12a, and in its request for hearing to the Supreme Court of Florida.

The Florida Court of Appeal ruled that state law was not preempted based specifically on the language found in the TCPA, 47 U.S.C. § 227(e)(1), entitled "State Law Not Preempted". App. 12a. The court, however, ignored the language found in that section which is stated in the negative, i.e. "nothing . . . shall preempt any State law that imposes more restrictive *intrastate* requirements or regulations on, or which prohibits . . . the use of artificial or prerecorded voice messages." (emphasis added).

Although these calls complied with federal standards regarding prerecorded calls, Florida prosecuted Sports Authority for violation of two sections of Florida law, i.e. the section prohibiting sales calls to persons whose names had been added to the state do-not-call list, Florida Statute § 501.059(4), and prohibiting prerecorded sales calls, Florida Statute § 501.059(7).

Sports Authority removed the case to federal court arguing that the TCPA and the FCC's regulations completely preempted state jurisdiction. The United States District Court, Middle District of Florida, Orlando Division ruled that there was no complete preemption and distinguished "complete" preemption from "ordinary" preemption. App. 34a-36a. The court then remanded the case to state court.

The Florida circuit court then issued two summary judgment rulings. The first ruling found Sports Authority in violation of Florida Statute § 501.059(7) regarding prerecorded calls. App. 26a. The second ruling found Sports Authority in violation of the Florida state do-not-call list rule, Florida Statute § 501.059(4). App. 21a.

Sports Authority now appeals to this Court to hear this case and rule that federal law preempts Florida Statute § 501.059 with regard to interstate telephone calls and to resolve the conflict between multiple state courts of last resort, U.S. courts of appeal, and the language of Congress and the FCC with regard to TCPA preemption.

ARGUMENT: REASONS FOR GRANTING THIS PETITION

This is an important issue with wide-ranging effects on interstate commerce including not only prerecorded telephone calls, but other subjects regulated by the FCC through the TCPA and its accompanying regulation. These include live and prerecorded telephone calls and the interaction between the National Do Not Call Registry and states which maintain their own do-not-call lists.[1] The FCC has implemented a comprehensive scheme for uniform regulation of these topics- a scheme frustrated by conflicting state law. This scheme does not deprive

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[1] As of the date of this Petition, Colorado, Florida, Indiana, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Oklahoma, Tennessee, Texas and Wisconsin still maintain their own state do-not-call lists. Further, many states' laws differ from the federal restrictions with regard to prerecorded calls, and only one of these, New Jersey, specifically limits application of the law to in state calls. N.J. Stat. §48:17-28.

states of the power to protect their own citizens, as both the TCPA, and an FTC regulation of related areas, the Telemarketing Sales Rule, 16 C.F.R. § 310.7, allow states to enforce terms of federal law. 47 U.S.C. § 227(f).

The Florida decision with regard to preemption has decided an important federal question in a way that conflicts with other state courts of last resort and United States courts of appeal. This question of federal law has not been settled by this Court.

The TCPA is one of two federal statutes which implemented the National Do Not Call Registry and also regulated prerecorded commercial and political telephone calls. This statute and the regulations implemented by the FCC regulate important areas of interstate commerce, and conflicting state laws interfere with the will of Congress as set forth in the law. This Court should resolve this question. Pursuant to Supreme Court Rule 10(b) and (c) this Court should grant this Petition for Writ of Certiorari.

I. THE FLORIDA COURT OF APPEAL HAS RULED ON AN IMPORTANT QUESTION OF FEDERAL LAW NOT YET SETTLED BY THIS COURT.

The Florida Court of Appeal has ruled that the TCPA does not preempt state law as applied to interstate telecommunications. App. 11a-14a. This Court has not ruled on this question, although the statements of the FCC regarding preemption are clear. State law is preempted as applied to interstate calls as it frustrates the federal scheme of uniform

national regulation of these calls.[2] Pursuant to Rule 10(c), the Court should issue a writ of certiorari.

A. The intent of the United States Congress and FCC is clear - interstate telephone calls are to be regulated solely by federal law.

Interstate telephone calls delivering recorded messages to consumers are regulated by the TCPA. 47 U.S.C. § 227. That law is administered by the FCC which has promulgated regulations to implement its terms. 47 C.F.R. § 64.1200. App. 73a.

The federal court which reviewed this question ruled that while the TCPA did not completely preempt state law, the specific question of whether application of this state law was preempted was a question for state court to review (i.e. the state court did have jurisdiction – there is no preemption of state court jurisdiction – but the question of whether the law is preempted remains open). App. 40a.

Congress and the FCC have been explicit with regard to preemption by the TCPA of state law as applied to interstate calls.

The TCPA provides that recorded messages are prohibited except as exempted by rule or order of the Commission or with the express consent of the recipient of the call. 47 U.S.C. § 227(b)(1)(B). The regulations allow prerecorded or artificial voice messages to consumers under five conditions including calls "made to a person with whom the caller has an established business relationship at the time the call is made . . ." 47 C.F.R. § 64.1200(a)(2)(iv).

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[2] *infra* at I.A.

The savings clause of the TCPA reads:

> Except for the standards prescribed under subsection (d) of this section and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits – (A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations.

47 U.S.C. § 227(e)(1). As set forth below, courts have ruled both that this language is and is not limited to intrastate calls, however the intent of Congress, when enacting this language, was clear.

"Over forty states have enacted legislation limiting the use of [recordings]. These measures have had limited effect, however, because *states do not have jurisdiction over interstate calls*." (emphasis added). Legislative History, S. Rep. No. 102-178, p. 3. Further, Senate Report 102-177 repeats the claim under "the need for legislation" that:

> As a result, over 40 States have enacted legislation limiting the use of automatic dialers or otherwise restricting unsolicited telemarketing. These measures have had limited effect, however, because *States do not have jurisdiction over interstate calls.* Many States have expressed a desire for federal legislation to regulate interstate telephone calls to supplement their restrictions on interstate calls.

102 Senate Report 177 (p. 3) (emphasis added).

The comments of Senator Hollings concerning state jurisdiction and the TCPA are set forth in the Congressional Record at 137 Cong. Rec. S. 18781 as:

> Section 227(e)(1) clarifies that the bill is not intended to preempt State authority regarding intrastate communications except with respect to the technical standard under § 227(d) and subject to § 227(e)(2). *Pursuant to the general preemptive effect of the Communications Act of 1934, State regulation of interstate communications, including interstate communications initiated for telemarketing purposes, is preempted.*

Id. at p. 10 (emphasis added).

Also in the Congressional Record, Senator Hollings stated that:

> Mr. Steve Hamm, administrative of the Department of Consumer Affairs of South Carolina, informed me that his office receives more complaints about computerized telephone calls at 900 numbers than any other problems. Despite the fact that South Carolina recently passed legislation to protect consumers from unwanted computerized calls within our State, South Carolina consumers continue to suffer from computerized calls made from out-of-State. *The State law does not, and cannot, regulate interstate calls. Only Congress can protect citizens from telephone calls that cross State boundaries. That is why Federal legislation is essential.*

137 Cong. Rec. S. 16204 at p. 4 (emphasis added).

Furthermore, the FCC has responded to consumer inquiries concerning preemption and stated unequivocally that it is the FCC's position that the

TCPA preempts state regulation of interstate calls with regard to recorded messages. Specifically, a March 3, 1998, letter from Geraldine A. Matise Chief, Network Services Division, to Mr. Sanford L. Schenberg states that: "In light of the provisions described above, states can regulate and restrict intrastate commercial telemarketing calls. The TCPA and Commission Regulations, enacted pursuant to the TCPA govern interstate commercial telemarketing calls in the United States." Similarly, a January 26, 1998 letter from Ms. Matise to Delegate Ronald A. Guns of the Maryland House of Delegates specifically addressed the delivery of recordings by telephone and states that:

> In light of the provisions described above, Maryland can regulate and restrict intrastate commercial telemarketing calls. The Communications Act, however, precludes Maryland from regulating or restricting interstate commercial telemarketing calls. Therefore, Maryland cannot apply its restricting interstate commercial telemarketing calls. Therefore, Maryland cannot apply its statutes to calls that are received in Maryland and originate in another state or calls that originate in Maryland and are received in another state.

The definition of "interstate communication" is defined in the Communications Act of 1934 as "any communication from any state to any state." 47 U.S.C. § 153(22). The *Guns* letter specifically addresses state law applicable to the delivery of recordings and is included in the appendix. App. 89a-94a.

The FCC discussed preemption of state law when it implemented revised TCPA rules establishing the

National Do Not Call Registry. "In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991" Report & Order, Federal Communications Commission, CG Docket No. 02-278, July 3, 2003, ¶¶ 81-85 ("FCC Report and Order").

The FCC ruled that:

> First, we conclude that, by operation of general conflict preemption law, the federal rules constitute a floor, and therefore would supersede all less restrictive state do-not-call rules. n263. We believe that any such rules would frustrate Congress' purposes and objectives in promulgating the TCPA. Specifically, application of less restrictive state exemptions directly conflicts with the federal objectives in protecting consumer privacy rights under the TCPA.
>
> *n263. See, e.g., Geier v. American Honda Motor Co.*, 529 U.S. 861, 873 (2000) (where state law frustrates the purposes and objectives of Congress, conflicting state law is "nullified" by the Supremacy Clause); *City of New York v. FCC*, 486 U.S. 57, 64 (1988) ("The statutorily authorized regulations of an agency will preempt any state or local law that conflicts with such regulations or frustrates the purposes thereof.").

Id. at ¶ 81.

The FCC explained that the "TCPA specifically prohibits the preemption of any state law that imposes more restrictive intrastate requirements or regulations." *Id.* at ¶ 82. The FCC went on to note that "this provision is ambiguous, however, as to whether this prohibition applies to both intrastate and interstate calls . . . . As set forth below, however,

we caution that more restrictive state efforts to regulate interstate calling would almost certainly conflict with our rules." *Id.*

The FCC noted that "we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. . . . We conclude that inconsistent interstate rules frustrate the federal objective creating uniform national rules . . . ." *Id.* at ¶ 83.

The FCC has acknowledged receiving at least six petitions for declaratory ruling seeking Commission preemption by the TCPA in particular state laws as applied to interstate telephone calls. Public Notice, DA 05-1347, May 13, 2005 http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-05-1347A1.doc. The FCC has not acted on these petitions to date. They seek preemption of parts of Florida, Indiana, New Jersey, North Dakota, and Wisconsin laws.

B. This Court has ruled that the Telecommunications Act and the FCC can preempt state law as applied to interstate calls.

It is well established that the Communications Act of 1934 can operate to preempt inconsistent state action with regard to interstate telephony. *La. Pub. Serv. Comm'n v. FCC,* 476 U.S. 355 (1986). That Act specifically grants the FCC authority to regulate interstate and foreign commerce in wire and radio communication while denying it jurisdiction with respect to intrastate communication service. *Id.* at 360.

The Supremacy Clause of the Constitution provides Congress with the power to preempt state law.

> Pre-emption occurs when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, . . . when there is outright or actual conflict between federal and state law, . . . where compliance with both federal and state law is in effect physically impossible, . . . where there is implicit in federal law a barrier to state regulation, . . . where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the states to supplement federal law, . . . or where the state law stands as an obstacle to the accomplishment and execution of the full objectives of congress.

Id. at 369-70. (Citations omitted).

As set forth above, the intent of Congress and the FCC is clear. It is also clear that the state law involved in this case frustrates the objectives of Congress to implement a uniform scheme of regulation for interstate telemarketing activity, FCC Report and Order at ¶ 83[3], and that this Court has preempted other state laws based on these reasons in the past.[4]

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[3] "We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. The record in this proceeding supports the finding that application of inconsistent rules for those that telemarket on a nationwide or multi-state basis creates a substantial compliance burden for those entities." *Id.* at ¶ 83.

[4] *supra* I.A.

II. THE FLORIDA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS BY COURTS IN OTHER JURISDICTIONS.

This Court should also accept review of this Petition based on Rule 10(a) and (b) because there is significant conflict between the circuits and federal and state courts with regard to the issue of TCPA preemption of state laws as applied to interstate calls. Numerous decisions have ruled that the TCPA preempts these laws for at least three different reasons:

1) The intent of Congress is clear, and interstate telephony is the normal and sole purview of federal law.

2) States have no independent regulatory authority over interstate calls.

3) Specific provisions of state law conflict with the federal scheme of uniform regulation.

A. California, Ohio and Texas courts have ruled that the TCPA preempts state law as applied to interstate calls.

Several courts have ruled that the TCPA preempts state laws applied to interstate calls based on express preemption or implied preemption.

1. California—*Chamber of Commerce of the United States of America v. Bill Lockyer* ruled that the TCPA preempts state law as applied to interstate telephone calls.

On February 27, 2006, the United States District Court for the Eastern District of California ruled that the TCPA preempts California state law regarding

interstate fax communications. *Chamber of Commerce of the United States of America v. Bill Lockyer*, 2006 U.S. Dist. LEXIS 8324 (E.D. Cal. 2006).

The court examined the issue raised by the TCPA allowing unsolicited facsimile advertisements to recipients with whom the caller has an established business relationship while California law required express consent before such faxes could be sent. *Id.* at 3.

The court noted that the FCC does have exclusive jurisdiction to regulate interstate telecommunications as ruled by this Court. *Id.* at 14, citing *Public Serv. Comm'n. v. FCC*, 476 US 355, 360 (1986). It also noted that the 9th Circuit clarified that the touchstone issue for preemption is the language and congressional intent of the specific federal statute. *Id.* at 16.

The federal court went on to examine the preemption language found in the TCPA (47 U.S.C. § 227 (e)(1)) and noted that interpretation which defines the word "intrastate" solely to limitations (rather than restrictions) violates established rules of statutory construction. *Id.* at 20. The court ruled:

> the Court must consider Congress' inclusion of the word "intrastate" in the savings clause. If the savings clause is construed to preserve the right to restrict both intrastate and interstate telecommunications, then the word "intrastate" places no constraint on the States' jurisdiction over telecommunications and the inclusion of the word "intrastate" would be surplusaged. As noted above, the Court believes that its duty to give each word some operative effect where possible precludes such a construction.

Id. at 21.

In conclusion, the court ruled that state law stood as an obstacle to the objectives of Congress when passing the TCPA and the Junk Fax Prevention Act of 2005 (an amendment to the TCPA). As such, state law violated the Supremacy Clause and was preempted. *Id.* at 24.

2. Ohio—*Charvat v. Telelytics, LLC* ruled that the TCPA preempts state law to the extent it frustrates national regulation of topics regulated by the TCPA.

In *Charvat v. Telelytics, LLC*, an appellate court in Ohio ruled that the TCPA preempted some, but not all, state law on the grounds that differing state restrictions frustrated the federal objective of creating uniform national rules. *Charvat*, 2006 Ohio 4623, at *P45 (Ohio Ct. App. 2006). The court then examined each instance of conflict between the Ohio rules and the TCPA with regard to telemarketing calls and held that those which placed more restrictive limitations on interstate calls were preempted. *Id.*

The court did not believe that Congress expressly preempted state law, but rather relied on implied conflict preemption which analyzed whether state law stood as an obstacle to accomplishing the full purposes and objectives of Congress. *Id.* at *P31.

The appeal court noted that the Supremacy Clause provides the United States Congress the power to preempt state law. *Id.* at *P23. "Although the savings clause clearly prohibits the preemption of any state law that imposes more restrictive intrastate requirements and regulations, the savings clause does not address whether the TCPA preempts states

from regulating interstate calls." *Id.* at *P26. "Because Congress remained silent on whether the TCPA explicitly preempts analogous state laws, the issue resolves to whether the TCPA implicitly or impliedly, through field preemption or conflict preemption, preempts state laws that impose more restrictive regulations on interstate telemarketing calls." *Id.* at *P28. The court then examined five different Ohio consumer protection restrictions to determine whether they conflicted with the TCPA's objective of creating uniform national rules on interstate telemarketing calls. *Id.* at *P33. The court then held each Ohio consumer protection restriction which was inconsistent with the TCPA to be preempted by implication. *Id.* at *P29.

3. Texas—*Omnibus International, Inc. v. AT&T, Inc.* ruled that states have no independent regulatory authority over interstate telephone calls

In *Omnibus International, Inc., v. AT&T,* a court of appeal in Texas ruled that the TCPA preempted state law expressly and states had no independent authority to regulate interstate telephone calls with regard to unsolicited facsimile advertisements. 111 S.W.3d 818, 823 (Tex. App. 2003). The court noted that "the TCPA does not preempt state law that imposes more restrictive intrastate requirements." *Id.* at note 7.

"States have no independent regulatory power over interstate telemarketing activities." *Id.* at 823 citing *Chair King, Inc., v. Houston Cellular Corp.,* 131 F.3d 507, 513 (5th Cir. 1997).

In *Chair King*, the 5th Circuit Court of Appeal included the language of Congress when it passed the TCPA:

> Congress enacted the TCPA as a supplement to state efforts to regulate telemarketing activities. This nonconsensual telemarketing activity was viewed by Congress as an invasion of privacy, an impediment to interstate commerce, and a disruption to essential public safety services. S. REP. NO. 178, 102nd Cong. 1st Sess. 1, 5 (1991) . . . . Congressional action was needed as states had no independent regulatory power over interstate telemarketing activities.

Chair King, 131 F.3d at 513.

The court therefore ruled that Texas' state law regulating facsimiles could not be applied to interstate facsimile transmissions. *Id.* at 823.

B. Decisions in the states of Indiana, Minnesota, North Dakota and Utah have held that the TCPA does not preempt state law as applied to interstate calls.

The above decisions, however, conflict directly with state supreme court decisions, United States courts of Appeal decisions, and federal district court decisions which have ruled under varying analyses, that the TCPA does not preempt state law as applied to interstate calls.

1. Indiana—In *FreeEats.com, Inc. v. State of Indiana* the court ruled that federal law did not preempt state law.

The United States District Court for the Southern District of Indiana, Indianapolis Division, addressed

the issue of TCPA preemption when it considered a challenge to Indiana's law regarding prerecorded telephone calls. *FreeEats.com v. State of Indiana, ex rel. Steve Carter*, 2006 U.S. Dist. LEXIS 77534 (S.D. Ind. 2006), reversed on other grounds by *FreeEats.com, Inc. v. State of Indiana and Steve Carter*, 502 F.3d 590 (7th Cir. 2007).

In the district case, Judge Larry McKinney ruled that the district court decision in *Lockyer*[5] was incorrect and there was no "compelling justification" for departing from the general presumption against preemption. *FreeEats.com,* 2006 U.S. Dist. LEXIS 77534, at *20.

That court examined two types of preemption: express and implied. *Id.*

Relying on *Van Bergen*[6], the Indiana court ruled that the TCPA does not make an attempt to occupy the field of interstate communications or to promote national uniformity of regulations. *Id.* at *23 citing *Erienet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 515 (3rd Cir. 1998). The court concluded that there was no conflict preemption between the more restrictive state laws and the federal scheme of regulation of prerecorded calls. *Id.* at *24.

2. Minnesota—*Van Bergen v. State of Minnesota* ruled that the TCPA did not preempt state law.

One of the first opinions regarding preemption of state law was *Van Bergen v. State of Minnesota*. 59 F.3d 1541 (8th Cir. 1995). That case considered pre-

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[5] *supra* at II.A.1.

[6] *infra* at II.B.2.

recorded calls placed by a Minnesota gubernatorial candidate.

The 8th Circuit relied on a savings clause of the TCPA, 47 U.S.C. § 227(e)(1) and ruled that "the TCPA does not expressly preempt the Minnesota Statute." *Van Bergen*, 59 F.3d at 1548.

The *Van Bergen* court also ruled that "the Minnesota statute is not in actual conflict with the TCPA . . ." because "there is nothing in the two statutes that creates a situation in which an individual cannot comply with one statute without violating the other." *Id.* The *Van Bergen* court did not review whether the differing state law frustrated the scheme of national regulation as implemented by the FCC.[7]

3. North Dakota—*State of North Dakota ex rel. v. FreeEats.com, Inc.* ruled that the TCPA did not expressly preempt state laws applied to interstate telephone calls.

In *State of North Dakota ex rel. Wayne Stenehjem v. FreeEats.com, Inc.*, 712 N.W.2d 828 (N.D. 2006) the Supreme Court of North Dakota analyzed whether the TCPA preempted state law applied to interstate telephone calls and the language of the TCPA savings clause, in particular. *Id.* at 840.

The North Dakota Supreme Court ruled that "we conclude Congress has clearly and unambiguously expressed its intent that the TCPA does not preempt application of a state statute prohibiting interstate telemarketing calls which use automatic dialing

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[7] The *Van Bergen* case involved intrastate telephone calls. *Van Bergen v. Minnesota*, United States District Court, District of Minnesota, Third Division, Civil No. 3-94-731, Memorandum Opinion and Order p. 11 (July 18, 1994).

equipment or article or prerecorded voice messages." *Id.* at 841. The Court noted that its decision was a direct conflict with *Lockyer*: "we decline to follow *Lockyer*." *Id.* at 842.

4. Utah—*Utah v. Flagship Capital* ruled that the TCPA did not preempt state laws applied to interstate calls.

The Supreme Court of Utah addressed the issue of federal preemption or TCPA preemption of state laws applied to interstate calls in *Utah Division of Consumer Protection v. Flagship Capital*. 125 P.3d 894 (Utah 2005). The Utah Supreme Court reviewed two types of preemption, express and implied. First, the court ruled that the TCPA did not completely preempt state law. *Id.* at 898.

Next, the Court ruled that "Congress did not craft the TCPA as an all-pervasive regulatory scheme" and therefore did not intend to preempt the "field" of interstate telephone calls. *Id.* at 899. The Court finally ruled that there is no conflict between Utah laws and the TCPA. *Id.* at 900. "A telemarketer who complies with Utah standards will have little difficulty complying with the federal standards." *Id.*

The Court did not address whether the Utah regulatory scheme prevents the federal uniform scheme of regulation of these calls.

C. Two U.S. district court cases, including the federal court which remanded this matter back to state court, have held that the TCPA does not "completely preempt" state law.

At least two U.S. District Courts have ruled that the TCPA does not completely preempt state court jurisdiction over these calls. "Complete preemption"

of state court authority is a different question, however, than whether federal law preempts state law with regard to interstate calls. *Fla. Dep't of Agric. and Consumer Serv. v. The Sports Authority*, U.S. Dist. Court, Middle Dist. of Florida; *North Carolina v. Debt Mgmt. Found. Serv., Inc.*, Case No. 5:03-CV-950-FL(3) (E.D. N.C. 2004). In *Florida Department of Agriculture and Consumer Services v. The Sports Authority,* U.S. District Court, Middle District of Florida, App. 31a, and *North Carolina v. Debt Mgmt. Found. Serv., Inc.*, Case No. 5:03-CV-950-FL(3) (E.D. N.C. 2004), U.S. District Courts reviewed the issue of whether the TCPA "completely" preempted state court jurisdiction over claims pursuant to the TCPA.

In both cases, the U.S. District Courts ruled that the TCPA did not completely preempt state law but distinguished the doctrine of "complete" preemption from "normal" preemption. "The doctrine of complete preemption is related to but differs from the related doctrine of 'ordinary preemption'. Ordinary preemption provides no basis for federal jurisdiction or removal . . .". App. 34a.

"Complete preemption can be found only in statutes with 'extraordinary' preemptive force." App. 35a. The U.S. District Court therefore ruled that Congress did not intend the TCPA to completely preempt state law. App. 35a. After finding removal to federal court was inappropriate based on "complete" preemption, the court, in *dicta* discusses the issues of ordinary preemption. App. 39a – 41a.

III. NEED FOR SUPREME COURT RESOLUTION

As set forth above, it is clear that the important federal question of preemption by the TCPA has been

answered differently by Congress, statements by the FCC, and opinions of United States appeal courts and state courts. This question has important and far reaching effects on every consumer in the United States based on application of the National Do Not Call Registry, also implemented by the TCPA, as well as prerecorded telephone calls of all types, including commercial, nonprofit solicitation, and political prerecorded calls.

Currently, conflicting state laws frustrate the goals of the TCPA and the FCC's regulations as well as the long tradition of federal regulation of interstate commerce and telephony. Sports Authority respectfully urges this Court to accept this Petition and issue a writ for these reasons.

Respectfully submitted,

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APPENDIX

APPENDIX A

SUPREME COURT OF FLORIDA

THURSDAY, DECEMBER 13, 2007

CASE NO.: SC07-1101
Lower Tribunal No(s): 5d06-1775

TSA STORES, INC., ETC.,
Petitioner(s),

vs.

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,
Respondent(s).

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

LEWIS, C.J., and PARIENTE, QUINCE, CANTERO, and BELL, *JJ.*, concur.

A True Copy
Test:

/s/ Thomas D. Hall
THOMAS D. HALL
Clerk, Supreme Court

SUPREME COURT OF THE STATE
OF FLORIDA *SAT CITO SI RECTE*

bm
Served:

HON. SUSAN WRIGHT, CLERK
BRIAN J. GILLIS
LOUIS E. STOLBA
RAYMOND C. "CHET" CONKLIN
HON. LYDIA GARDNER, CLERK
WILLIAM E. RANEY
HON. JOHN H. ADAMS, SR., JUDGE

APPENDIX B

IN THE CIRCUIT COURT
FOR ORANGE COUNTY, FLORIDA

CASE NO. 03-CA-10535

STATE OF FLORIDA, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,
Plaintiff,

v.

THE SPORTS AUTHORITY, FLORIDA INC.,
a Florida Corporation,
Defendant.

FINAL JUDGMENT AND PERMANENT INJUNCTION AFTER REMAND

THIS CAUSE came before the Court after Remand. The 5th District Court of Appeal having affirmed in part and reversed in part the Final Summary Judgment of this court dated April 11, 2006; the Florida Supreme Court having declined jurisdiction for further review; and the Court being duly advised on the premises, the Court Orders and Adjudges as follows:

1. With respect to 73 alleged violations of section 501.059(7) Fla. Stat.: The court finds, as a matter of law that the prohibitions against

> [making or knowingly allowing] a telephonic sales call to be made if such call involves an auto-

> mated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called

are separate and apart from the issues of—and defenses to—whether or not the telephone number of the person called by the automated system appears on the no sales solicitation calls listing published by plaintiff. There are no genuine issues as to any material fact and plaintiff is entitled to summary judgment as a matter of law with respect to the 73 violations of section 501.059(7) Fla. Stat. alleged.

2. TSA Stores, Inc., a successor in interest by reason of merger to The Sports Authority Florida Inc., formerly a wholly owned subsidiary, has made or knowingly allowed telephonic sales calls to 73 persons wherein such calls involved the use of an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection was completed to a number called, in violation of section 501.059(7), Fla. Stat.

3. When a regulatory statute provides for injunctive relief, an injunction is proper upon the showing of a violation of such statute. See *Harvey v. Wittenberg*, 384 So.2d 940 (Fla. 3d DCA 1980); *Metropolitan Dade County v. O'Brien*, 660 So.2d 364 (Fla. 3d DCA 1995); and, *State Department of Environmental Regulation v. Kaszyk*, 590 So.2d 1010 (Fla. 3d DCA 1991).

4. The court takes judicial notice of 13 Final Judgments of Florida Courts that assessed civil penalties in the amount of $750.00 per violation pursuant to section 501.059 Fla. Stat. It is

ORDERED AND ADJUDGED that Defendant, TSA Stores, Inc., a successor in interest by reason of

merger to The Sports Authority Florida, Inc., formerly a wholly owned and subsidiary is permanently restrained and enjoined and its agents, employees or any other persons who act under, by, through or on behalf of Defendant, from violations of Section 501.059(7) Florida Statutes; and, Defendant and its agents, employees or any other persons who act under, by, through or on behalf of Defendant are specifically enjoined from using or employing an automated system for selection and/or dialing of telephone numbers or playing of a recorded message when the number called is answered. It is further

ORDERED AND ADJUDGED that Plaintiff have and recover from Defendant, TSA Stores, Inc., a successor in interest by reason of merger to The Sports Authority Florida, Inc., formerly a wholly owned subsidiary, a civil penalty in the amount of $54,750.00, together with court costs of $201.75, a total of $54,951.75, plus interest at the legal rate of seven (9%) per cent per annum calculated from April 11, 2006 (the date of the original Final Summary Judgment) through January 31, 2008, for a total judgment amount of $63,868.38 for all of which let execution issue. It is further

ORDERED that the total judgment amount of $63,868.38 shall be disbursed by the Clerk of Court payable to The State of Florida, Department of Agriculture and Consumer Services, from the proceeds of the Civil Supersedeas Bond filed with this Court on November 3, 2006. The check shall be sent to Raymond C. "Chet" Conklin, Esq., 2005 Apalachee Parkway, Terry Rhodes Building, 2nd Floor, Tallahassee, Florida 32301. The remaining balance of the Civil Supersedeas Bond, in the amount of $70,119.68, shall be disbursed by the Clerk of Court payable to

The Trust Account of Copilevitz & Copilevitz. The check shall be sent to William E. Raney, Esq., Copilevitz & Canter, 310 W. 20th Street, Suite 300, Kansas City, Missouri 64108. Upon disbursement by the Clerk to Court the total judgment amount to Plaintiff, Plaintiff's counsel shall forthwith execute a satisfaction to judgment, file same with the Court and record the document with Martha O. Haynie, Orange County Comptroller. It is further

ORDERED that the Court shall retain jurisdiction to this matter to enforce the provisions to this Final Judgment and Permanent Injunction and to provide such other and further relief as the Court shall deem just and proper to enforce this Final Judgment and Permanent Injunction.

DONE AND ORDERED in Chambers, in Orange County, Florida, on February 18, 2008.

Copies furnished to:

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APPENDIX C

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA FIFTH DISTRICT

Case No. 5D06-1775

TSA STORES, INC.,
A DELAWARE CORPORATION,
Appellant,

v.

DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,
Appellee.

Opinion filed April 20, 2007

Appeal from the Circuit Court
For Orange County,
John H. Adams, Judge.

Brian J. Gillis, of Bogin, Munns & Munns, P. A., Orlando, and William E. Raey, of Copilevitz & Canter, LLC, Kansas City, Missouri, for Appellant.

Louis E. Stolba and Raymond C. Conklin, of Florida Department of Agriculture and Consumer Services, Tallahassee, for Appellee.

MONACO, J.

This case causes us to examine the reach of section 501.059, Florida Statutes (2004), the statute that

governs telephone solicitations in Florida. TSA Stores, Inc., which operates retail establishments in Florida known as "The Sports Authority," seeks reversal or the trial court's Final Summary Judgment and Permanent Injunction in which the court: (1) permanently enjoined TSA from calling Florida consumers whose names appear on the quarterly "no sales solicitation calls" list published by the appellee, State or Florida Department or Agriculture and Consumer Services; and (2) permanently enjoined TSA from using or employing an automated system for the selection and dialing or telephone numbers or playing a recorded message when the number called is answered; and (3) imposed a civil penalty for the statutory violations. We are presented in this case with issues or first impression in Florida. We affirm the final judgment as it relates to the automated dialing and recorded message violations, but reverse with respect to the calls on the "do-not-call" lists because these calls fall within a statutory exemption.

The Department initiated this case by the filing or a complaint accusing TSA or violating sections 501.059(4) and (7), and seeking injunctive relief and civil penalties. At the time TSA had its principal place or business in Broward County, Florida, but the telephone calls that form the substance or the complaint were made to consumers throughout Florida, including Orange County, the venue for this action.[1] The Department alleged that TSA was conducting part or its business by making or allowing others to make telephonic sales calls to citizens or Florida and playing a recorded message when the number called

[1] The original defendant was The Sports Authority, Inc. After this action began, TSA Stores, Inc., a Delaware corporation, was substituted as the party defendant.

was answered. According to the Department, TSA had been making unsolicited telephonic sales calls to persons in this state whose names appeared on the then-current quarterly no sales solicitation list published by the Department. In addition, the Department alleged that TSA made or knowingly allowed sales calls to be made with an automated system without a live operator introducing the message in violation of section 501.059(7), Florida Statutes.

TSA first attempted to remove this case to the United States District Court for the Middle District of Florida. TSA posited that the Federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, preempted section 501.059, and that removal was, therefore justified. The federal court concluded, however, that the case was improvidently removed from the Florida courts, and remanded it back to the Circuit Court for Orange County, Florida.

After the close of the state court pleadings, the Department moved for summary judgment. The trial court, in granting summary judgment, first adopted the rulings of the federal court as its own. It then concluded that TSA violated section 501.059 in two distinct ways.

First, it addressed the issues surrounding seventy-seven persons who actually made purchases at The Sports Authority facilities in Florida within 18 months preceding TSA's making of an unsolicited telephone sales call. Each of these persons was on the Florida "do-not-call" list.[2] TSA asserted that all of these

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[2] The national do-not-call registry is the product of a regulatory effort going back to 1991. It aimed, first, at protecting the privacy rights of consumers, and second at reducing the risk of

persons fell within the exemption set forth in section 501.059(1)(c)(3)., which allows a telephonic sales call to a person on the "do-not-call" list if that person is one "with whom the telephone solicitor has a prior or existing business relationship." The Department, however, argued that a "business relationship" implies more than the "mere speculation" that a past customer may choose to buy from TSA again. The trial judge agreed with the Department and concluded that "the mere occurrence of sales to TSA's past customers—without more—do [sic.] not constitute 'prior or existing business relationships' within the contemplation of subsection 501.059(1)(c)3."

Next, the trial court considered the issues surrounding seventy-three persons on the do-not-call list who received a recorded message concerning a sale to be held at TSA's stores within Orange County, Florida. TSA in this connection was charged with violating section 501.059(7)(a), which reads:

> No person shall make or knowingly allow a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called.

While this provision specifically protects persons on the do-not-call list, it does not appear to be subject to an exception for prior or existing business relationships. See § 501.059(7)(b), Fla. Stat. (2004).

TSA argued, first, that the automated pitches were not "telephonic sales calls" because they only invited past customers to a sales event at TSA stores. Next,

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telemarketing abuse and fraud. *See F.T.C. v. Mainstream Mktg. Servs. Inc.*, 345 F.3d 850, 857-58 (10th Cir. 2003).

it argued that in any event, each of these calls was made from California to Florida customers, and that because Florida courts do not have jurisdiction over interstate calls, the statute did not apply to it. The trial court found, however, that the Florida statute applied, and that TSA violated it because the calls constituted telephonic sales calls within the meaning of the statute. Implicit in these holdings of the trial court is the conclusion that even though the telephone calls were initiated from outside of Florida, the TCPA did not preempt the applicable Florida statute.

I. Federal Preemption

The TCPA resulted from findings made by Congress during the early 1990's that for many consumers telemarketing sales calls were an "intrusive invasion of privacy," as well as an unwanted opportunity for unscrupulous persons to commit fraud upon them. *See Mainstream Mktg. Servs., Inc., v. F.T.C.*, 358 F.3d 1228, 1235 (10th Cir. 2004). Congress estimated that consumers were losing about $40 billion per year as a result of telemarketing fraud. *Id.* In order to deal with this growing concern Congress authorized the creation of a national database of consumers who objected to receiving such telephone calls. Since then, well over half of the states have adopted statutes restriction various practices by telemarketing firms. *See Van Bergen v. Minnesota*, 59 F.3d 1541, 1548 (8th Cir. 1995).

The overarching consideration governing the dispute before us in the present case is whether the federal government by enactment of the TCPA has preempted the regulation of telephonic sales calls. That is to say, we must first determine whether there was any room for regulation by Florida of these telephone

calls. The answer is to be found within the TCPA itself.

47 U.S.C. § 227(e)(1) is entitled "State law not preempted," and reads as follows:

> Except for the standards prescribed under subsection (d)[3] of this section and subject to paragraph (2)[4] of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—
>
> (A) The use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;
>
> (B) the use of automatic telephone dialing systems;
>
> (C) the use of artificial or prerecorded voice messages; or
>
> (D) the making of telephone solicitations.

In addition, 47 U.S.C. § 227(f) is instructive. That provision authorizes states to bring civil actions for violations of the TCPA in federal district courts. Of particular interest is paragraph (6) of the subsection entitled "Effect on State court proceedings," which reads:

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[3] Subsection (d) concerns and sets certain technical and procedural standards with respect to communications by facsimile machine or automatic telephone dialing systems, and grants to the Federal Communications Commission the authority to prescribe standards to implement the requirements of the subsection.

[4] Paragraph (2) of the subsection concerns the state use of databases.

> Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general or criminal statute of such State.

TSA essentially argues that the federal statute has preempted state laws governing the regulation of unsolicited sales calls and the improper use of prerecorded messages claims. Yet the TCPA specifically disclaims a complete preemption in these areas. *See Fla. Dep't of Agric. & Consumer Servs. v. The Sports Authority Fla., Inc.*, Case No. 6:04-cv-115-Orl-JGG, 2004 U.S. Dist. LEXIS 29646, at *9 (M.D. Fla. June 4, 2004). Thus, the TCPA carries no implication in its language that Congress intended to preempt state law in this regard.

Certainly if Congress had intended a complete preemption of other state laws, that intent could easily have been manifest as part of the statute. Moreover, the language used in subsections (e)(1) and (f) of the TCPA makes it clear that Congress did not intend to occupy the field, at least with respect to the disclaimers to that effect contained in those provisions. *See Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963); *Van Bergen*, 59 F.3d at 1548. We conclude, therefore, that section 501.059 of the Florida Statutes does have significant vitality both in the regulation of unsolicited telephone sales solicitations and in the improper use of prerecorded messages and automated dialing machines described in the statute.

II. Unsolicited Telephonic Sales Calls.

Section 501.059(3), Florida Statutes, allows the placement for a nominal fee of any residential, mobile, or telephonic paging device number on a "no sales

solicitation calls" listing to be maintained by the Department. Placement of a number on the so-called "do-not-call" list indicates that the subscriber does not wish to receive unsolicited telephonic sales calls. Section 501.059(4), one of the statutes that TSA is accused of violating, reads in pertinent part:

> No telephone solicitor shall make or cause to be made any unsolicited telephonic sales call to any residential, mobile, or telephonic paging device telephone number if the number for that telephone appears in the then-current quarterly listing published by the department.

As noted previously, seventy-seven persons within Florida who were on the do-not-call list were telephonically contacted by TSA for the purpose of soliciting a sale of goods. Each of these persons, however, had actually made purchases from TSA within eighteen months preceding the call. Although TSA argued that all of these persons had a "prior or existing business relationship" with them, and therefore fell within the section 501.059(1)(c)3. exemption, the trial court disagreed.

Section 501.059(1)(c) of the Florida Statutes defines an "unsolicited telephonic sales call" to be a telephonic sales call other than one specifically exempted by the statute. Among the four exemptions listed, the two that are pertinent to our decision are sales calls other than a call made:

> 1. In response to an express request of the person called;
>
> [and]

> 3. To any person with whom the telephone solicitor has a prior or existing business relationship.

§ 501.059(1)(c)1., 3., Fla. Stat. (2004).

TSA first argued that it had the express consent of all those it called because each consumer provided his or her telephone number to TSA at the time of the sale. Voluntarily surrendering one's telephone number to a sales clerk might under some circumstances give an implied authority for the store to make a later telephonic sales call, but it certainly does not give an "express" consent. As an express consent is required by this clear language of this exemption, we conclude that the trial judge was correct in determining that this exemption was not applicable.

A more difficult issue is presented by the "prior or existing business relationship" exemption, however. Unfortunately, section 501.059 does not define this phrase. In circumstances where the Legislature chooses not to define a term, courts may properly be informed by case law or related statutory provisions that do give meaning to the term. *See State v. Hagan*, 387 So. 2d 943, 945 (Fla. 1980); *Westerheide v. State*, 767 So. 2d 637, 650 (Fla. 5th DCA 2000). Thus, in *State v. Kirvin*, 718 So. 2d 893 (Fla. 1st DCA 1998), for example, the appellate court was able to utilize a definition for "territorial sea baseline" found in the Code of Federal Regulations when interpreting a Florida constitutional provision concerning fishing nets.

The Federal Communications Commission by way of the Code of Federal Regulations provides us with a definition for "established business relationship," as used in the TCPA. 47 C.F.R. § 64.1200(f)(4) defines that term as meaning

> a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's purchase or transaction with the entity within eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

It appears, therefore, that if a telephone subscriber made a purchase from TSA within eighteen months of the telephone solicitation, there was no violation of section 501.059(4).

Here, the Department has stipulated that the seventy-seven consumers who received telephone solicitations from TSA had all made purchases from TSA within eighteen months of the solicitation. Under the circumstances, therefore, it appears that the exemption applies to these calls, and that summary judgment in this connection was improperly granted in favor of the Department.

III. Improper Use of Recorded Messages and Automatic Dialing Systems.

Section 501.059(7)(a) prohibits "mak[ing] or knowingly allow[ing] a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called." The Department alleged and the trial judge concluded that TSA violated this provision

by the use or employment of an automated system for the selection and dialing of seventy-three consumer telephone numbers or the playing of a message when the number was answered. It is conceded by the Department that all of these calls were made from California. We note, however, that subsections (7)(a) and (b) do not appear to be subject to the "prior or existing business relationship" exceptions dealt to "*any unsolicited* telephonic sales call," while subsection (7) applies to "a telephonic sales call." As the language of the exemption makes it applicable only to "unsolicited telephonic sales calls," it is definitionally inapplicable to the proscriptions of subsection (7).

TSA does not deny that it made the call in question. It argues, instead, that because all of these automated calls originated in California and are interstate calls, Florida has no authority to regulate them. It suggests, in essence, that the Florida statute might be fully avoided by the simple expedient of taking the automated call machine to a different state, and having the calls to Florida consumers made there. Because of the language of the Florida statute, however, we need not reach the issue of whether the states have jurisdiction over automated calls originating out of state. The statute covers this contingency.

In 47 U.S.C. § 227(f)(6) Congress specifically indicated that nothing in the TCPA was to be construed to prohibit the State "from proceeding in State court on the basis of an alleged violation of any general or criminal statute of such State." Indeed, Congress indicated that its regulation of the field was the "minimum necessary to protect the public against the harm caused by" automated dialing machines. *See* S. Rep. No. 102-178 at 5 (1991) *as reprinted in* 1991,

U.S.C.C.A.N., 1968, 1973. Even though it recognized that states might not have jurisdiction over interstate communications, Congress thus provided language that specifically allows states to impose more restrictive measures in this area. *See FreeEats.Com, Inc. v. Indiana*, 2006 WL 3025810 (S.D. Ind. Oct. 24, 2006). *Cf., ErieNet, Inc. v. Velocity Net, Inc.*, 156 F.3d 513, 515 (3d Cir. 1998). That is exactly what Florida has done.

The pertinent Florida statute, section 501.059(7), prohibits the use of automated phone messages with the following language:

> No person shall make or *knowingly allow* a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to the number called.

(Emphasis added). The complaint filed by the Department clearly indicates that this cause of action accrued in Orange County, Florida, because TSA had a commercial business in Orange County, and that TSA was making or causing to be made telephonic sales calls to customers in Orange County, Florida, during which TSA played or caused to be played a recorded message upon each call being answered.

There is nothing contained within the TCPA that points to an intent by Congress to preempt such state claims. 47 U.S.C. § 227(f)(6), in fact, suggests just the opposite. Moreover, the very language of the Florida statute anticipates that the entity making the calls and the entity causing or knowingly allowing the calls to be made might very well be separate entities. Thus, while the making of the calls may

have emanated from an out-of-state source, the causation element underpinning this particular violation of statute involves a business in Orange County, Florida, inviting customers in Orange County, Florida, to a sale being held in a store in Orange County, Florida. As the origination point of the automated calls is not relevant in this context, the trial court was correct in granting summary judgment on this issue.

IV. Conclusion.

In view of the foregoing, we affirm that part of the summary final judgment permanently enjoining TSA from further violating section 501.059(7), Florida Statutes, and affirm the civil fine associated with TSA's violations of that statute; reverse that part of the final summary judgment concluding that TSA violated section 501.059(4), Florida Statutes, including the injunctive relief and fines imposed in that connection; and remand for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED.

SAWAYA and PALMER, *JJ.*, concur.

APPENDIX D

IN THE CIRCUIT COURT FOR
ORANGE COUNTY, FLORIDA

[Filed APR. 11, 2006]

CASE NO. 03-CA-10535

STATE OF FLORIDA, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,
Plaintiff,

v.

THE SPORTS AUTHORITY FLORIDA INC.,
a Florida Corporation,
Defendant.

FINAL SUMMARY JUDGMENT AND PERMANENT INJUNCTION

THIS CAUSE coming before the Court upon the Plaintiff's Motion for Summary Judgment; the prior ORDER ON MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION dated October 31, 2005 *nunc pro tunc*; and the Order of the U.S. District Court remanding the case back to this court; and the Affidavits, admissions, and other documents in support thereof and the Court being duly advised on the premises, the Court Finds, Orders and Adjudges as follows:

1. Paragraph 1 through 4, and 6 through 9 of the prior ORDER ON MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION dated October 31, 2005 *nunc pro tunc* ("the PRIOR ORDER") are ratified, republished and

incorporated herein by this reference as fully as if set forth at length. The Court has jurisdiction of the parties and subject matter of this action.

2. The prior Order retained jurisdiction to determine—as the sole remaining issues—the application of subsection 501.059(1)(c) 3. Fla. Stat. to the 77 past-customer-complainants alleging violations of section 501.059(4) Fla. Stat., as more particularly set forth in paragraph 5 thereof.

3. TSA has made no pleadings, evidentiary or other showing of any actual or identifiable understanding or agreement with such 77 past-customer-complainants that they will continue to do business with TSA. The Court finds, as a matter of law, that the mere occurrence of sales to TSA's past customers—without more—do not constitute past or present "business relationships" within the contemplation of subsection 501.059(1)(c) 3. Fla. Stat. *Georgetown Manor, Inc., etc., et al. v. Ethan Allen, Inc., etc. et al*, 47 F.3d 1099 (U.S.C.A. 5th Cir 1995); *Ethan Allen, Inc. v. Georgetown Manor, Inc.*, 647 So.2d 812 (Fla. 1994); *Register v. Pierce*, 530 So.2d 990, 993 (Fla. 1st DCA 1988).

4. There are no genuine issues as to any material facts or law and plaintiff is entitled to judgment as matter of law.

5. TSA has called 77 persons whose telephone numbers appear on the Plaintiff "no sales solicitation calls" list, and such calls violate Section 501.059(4), Fla. Stat.[1] Further, TSA violated

---

[1] There are a total of 83 complaining consumers. Most—but not all—consumers complained of both statutory violations.

Section 501.059(7), Fla. Stat. by using or employing an automated system for selection and dialing of 73 consumer telephone numbers or playing of a recorded message when the number called is answered, more particularly set forth in the prior Order—a total of 150 violations of Section 501.059 Fla. Stat. It is therefore

JUDGMENTS

ORDERED AND ADJUDGED that Defendant, The Sports Authority, Inc., is permanently restrained and enjoined and his agents, employees or any other persons who act under, by, through or on behalf of Defendant, from violations of Section 501.059, Florida Statutes; and, Defendant is further specifically enjoined from calling Florida consumers whose names now appear, and hereafter appear, on the quarterly "no sales solicitation calls" listing published by Plaintiff; and Defendant is further specifically enjoined from using or employing an automated system for selection and dialing of telephone numbers or playing of a recorded message when the number called is answered. It is further

ORDERED AND ADJUDGED that Defendant The Sports Authority, Inc., is ordered to pay to Plaintiff a civil penalty in the amount of $112,500.00, court costs of $201.75, a total of $112,701.75, plus interest at the legal rate of 9% from the date hereof, for all of which let execution issue. It is further

ORDERED AND ADJUDGED that the Court shall retain jurisdiction of this matter to enforce the provisions of this Final Judgment and Permanent Injunction and to provide such other and further relief as the Court shall deem just and proper to

enforce this Final Judgment and Permanent Injunction. It is also

ORDERED AND ADJUDGED that the defendant-judgment debtor(s) shall complete under oath Florida Rule of Civil Procedure Form 1.977(b) (Fact Information Sheet), including all required attachments, and serve it on the judgment creditor's attorney, or the judgment credit if the judgment creditor is not represented by an attorney, within 45 days from the date of this final judgment, unless the final judgment is satisfied or post-judgment discovery is stayed.

Pursuant to Rule 1.560 (e), Fla.R.Civ.P. the judgment debtor shall file with the clerk of court a notice of compliance with this order to complete form 1.977(b), and serve a copy of the notice of compliance on the judgment creditor or his attorney.

Jurisdiction of this case is retained to enter further orders that are proper to compel the judgment debtor(s) to complete form, 1.977(b), including all required attachments, and serve it on the judgment creditor's attorney or the judgment creditor if the judgment creditor is not represented by an attorney.

DONE AND ORDERED in Chambers, in Orange County, Florida on April 11, 2006.

/s/ Judge
Circuit Judge

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APPENDIX E

IN THE CIRCUIT COURT
FOR ORANGE COUNTY, FLORIDA

Case No. 03-CA-10535

STATE OF FLORIDA, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,
Plaintiff,

v.

THE SPORTS AUTHORITY, FLORIDA INC.,
a Florida Corporation,
Defendant.

ORDER ON MOTION FOR SUMMARY JUDGMENT AND PERMANENT INJUNCTION

THIS CAUSE coming before the Court upon the Plaintiff's Motion for Summary Judgment and Permanent Injunction, the Order of the U.S. District Court remanding the case back to this court, and the Affidavits, admissions, and other documents in support thereof and the Court being duly advised on the premises, the Court makes the following findings and judgments:

FINDINGS

1. Defendant, THE SPORTS AUTHORITY FLORIDA, INC. ("TSA") was served with a Summons and Complaint together with Plaintiff's Request for Admission. TSA filed an answer and affirmative defenses to the Amended Complaint but filed no objec-

tions or responses to the Requests For Admission until September 23, 2005—581 days past the due date. TSA was represented by counsel throughout but offered no showing on grounds for relief for failure to timely respond to Plaintiff's Requests for Admission. TSA improvidently removed the case to the U. S. District Court, Middle District of Florida but the case was remanded back to this Court by Order dated June 4, 2004. The Court has jurisdiction of the parties and subject matter of this action.

2. Plaintiff's Amended Complaint alleged that TSA violated section 501.059 (4) Fla. Stat. by making or causing calls to be made to consumers who had placed their telephone numbers on the State of Florida's "No Sales Solicitation list; and section 501.059 (7) Fla. Stat. by making or knowingly allowing telephonic sales calls to Florida residents utilizing an automated system for the selection or dialing of telephone numbers and the playing of a recorded message that plays when a connection is completed to a number called. The basis for the statute is residential privacy. It is the public policy of the State of Florida, expressed by the legislature in the consumer protection laws—particularly section 501.059 Fla. Stat.—to protect consumers from specified unwanted intrusions of telephonic sales solicitations into their lives. *See, Gilbreath v. State*, 650 So.2d 10 (Fla. 1995), and cases cited therein;

3. Upon removal to the U.S. District Court TSA asserted that Plaintiff's Florida State law claims under § 501.059 Fla. Stat. had been preempted by the federal Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227; or alternatively the TCPA had provided TSA with a defense, or defenses, to Plaintiff's state law claims. The District Court stated, *inter*

alia, that "In the instant case, a careful reading of the TCPA indicates that Congress neither intended it to provide a defense to state-law claims nor intended it to allow removal of such claims to a federal forum." This court takes judicial notice of the June 14, 2004 District Court Order that remanded this cases back to this court.

4. This court agrees with—and adopts—the reasoning and rationale of the District Court Order. The court finds as a matter of law that the issue whether the TCPA provided TSA with a defense, or defenses, to Plaintiff's state law claims was litigated in the District Court. TSA's affirmative defenses in the instant case assert substantially the same matters that were litigated in the District Court. TSA is estopped from re-litigating such issues in this court. *See, Mobil Oil Corp. v. Shevin*, 354 So.2d 372 (Fla. 1977); and *Hochstadt v. Orange Broadcast*, 588 SO:2d 51 (Fla. 3d DCA 1991), cited in *Mobil Oil Corp. v. Shevin, supra.*

5. With respect to the 77 alleged violations of section 501.059(4) Fla. Stat.: TSA asserts: If a consumer makes a retail purchase at a TSA store and supplies his telephone number to the sales clerk that consumer is considered as having a prior or existing business relationship with TSA. TSA thus asserts that telephonic sales calls to such retail purchasers are exempted from the prohibitions of § 501.059(4) Fla. Stat. for a period of 18 months. Plaintiff candidly admitted that it had no evidence to refute TSA's assertion that the 77 complainants alleging violations of § 501.059(4) Fla. Stat. had made purchases from TSA within 18 months next preceding the subject unsolicited telephonic sales calls, notwithstanding that all such 77 complainants disclaimed the existence of

any prior or existing business relationship with TSA. Plaintiff did not carry its burden regarding the application of subsection 501.059(1)(c) 3. Fla. Stat. to those 77 complainants. Thus, plaintiff's motion for summary judgment is *denied* with respect to the 77 alleged violations of § 501.059(4) Fla. Stat. Application of subsection 501.059(1)(c) 3. Fla. Stat. to those 77 complainants is reserved as the sole issues for determination at non-jury trial.

6. With respect to 73 alleged violations of section 501.059(7) Fla. Stat.: The court finds, as a matter of law that the prohibitions against

> [making or knowingly allowing] a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called

are separate and apart from the issues of—and defenses to—whether or not the telephone number of the person called by the automated system appears on the no sales solicitation calls listing published by plaintiff. There are no genuine issues as to any material fact and plaintiff is entitled to partial summary judgment as a matter of law with respect to the 73 violations of section 501.059(7) Fla. Stat. alleged.

7. TSA had made or knowingly allowed telephonic sales calls to 73 persons wherein such calls involved the use of an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection was completed to a number called, in violation of section 501.059(7), Fla. Stat.

8. When a regulatory statute provides for injunctive relief, an injunction is proper upon the showing of a violation of such statute. See *Harvey v. Wittenberg*, 384 So.2d 940 (Fla. 3d DCA 1980); *Metropolitan Dade County v. O'Brien*, 660 So.2d 364 (Fla. 3d DCA 1995); and, *State Department of Environmental Regulation v. Kaszyk*, 590 So.2d 1010 (Fla. 3d DCA 1991).

9. The Court takes judicial notice of 13 Final Judgments of Florida Courts that assessed civil penalties in the amount of $750.00 per violation pursuant to section 501.059 Fla. Stat.

ADJUDICATIONS

ORDERED AND ADJUDGED that Defendant, The Sports Authority, Inc., is permanently restrained and enjoined and its agents, employees or any other persons who act under, by, through or on behalf of Defendant, from violations of Section 501.059(7) Florida Statutes; and, Defendant and its agents, employees or any other persons who act under, by, through or on behalf of Defendant are specifically enjoined from using or employing an automated system for selection and/or dialing of telephone numbers or playing of a recorded message when the number called is answered. It is further

ORDERED AND ADJUDGED that Defendant The Sports Authority, Inc., is ordered to pay to Plaintiff within 30 days of the date hereof a civil penalty in the amount of $54,750.00 with respect to the 73 violations of section 501.059(7) Fla. Stat. alleged. It is further

ORDERED AND ADJUDGED that the Court shall retain jurisdiction of the this matter to enforce the provisions of this Order and Permanent Injunction and

provide such other and further relief as the Court deems just and proper to enforce this Order and Permanent Injunction. It is also

ORDERED AND ADJUDGED that the Court shall retain jurisdiction to determine the application of subsection 501.059(1)(c) 3. Fla. Stat. to the 77 complainants alleging violations of § 501.059(4) Fla. Stat., as more particularly set forth in paragraph 5 of the findings hereinabove.

DONE AND ORDERED in Chambers, in Orange County, Florida October 31, 2005.

/s/ Judge
Circuit Judge

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APPENDIX F

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

Case No. 6:04-cv-115-Orl-JGG

STATE OF FLORIDA, DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES,
Plaintiff,

-vs-

THE SPORTS AUTHORITY, FLORIDA, INC.,
Defendant.

ORDER

This cause came on for consideration without oral argument on Plaintiff's Motion to Remand (Docket No. 7) and memorandum in support (Docket No. 8), as well as Defendant's memorandum in opposition (Docket No. 10). For the reasons stated below, the Motion to Remand ("the Motion") is GRANTED.

I. PROCEDURAL HISTORY

Plaintiff, State of Florida Department of Agriculture and Consumer Services (the "Department") filed suit against Defendant, The Sports Authority Florida, Inc. ("The Sports Authority"), on December 4, 2003 in the Circuit Court in and for Orange County, Florida. In its complaint (Docket No. 2), the Department alleged that The Sports Authority violated Fla. Stat. § 501.059, a subsection of Florida's Consumer Protection Statute that governs telephone solicitation. Docket No. 2 at ¶¶ 7-8. Specifically, the

Department alleged that The Sports Authority violated § 501.059(4) by making calls (or causing calls to be made) to consumers on the state's "No Sales Solicitation" list and violated § 501.059(7) by utilizing a recorded message that plays when a caller answers. Docket No. 2 at ¶ 7.

On January 27, 2004, The Sports Authority filed a Notice of Removal in the state court. The Sports Authority asserted that the Department's state law claims under § 501.059 had been completely preempted by the federal Telephone Consumer Protection Act (the "TCPA"), 47 U.S.C. § 227, which—*inter alia*—prohibits unsolicited telephone calls that employ prerecorded messages. *See* 47 U.S.C. § 227(b)(1)(B). On February 6, 2004, the Department filed a motion to remand, arguing that the TCPA did not preempt state-law claims, and therefore the district court lacked subject matter jurisdiction to hear the dispute. *See* Docket No. 7.

The Sports Authority asserts that the calls referred to in the complaint were all made into Florida from out of state. Docket No. 10 at page 3. The complaint itself is silent as to whether the calls originated inside or outside of Florida. *See id.*

The Sports Authority also contends that the Department has engaged in "artful pleading" and—without further elaboration—that this, too, provides a basis for removal. See, e.g., Docket No. 10 at 15. However, The Sports Authority acknowledges that its artful pleading argument requires a determination that Congress intended to completely preempt the claims raised by the Department:

> Artful pleading requires the presence of either complete preemption o[r] a state cause of action

> the merits of which turn on an important federal question. *Here, the merits of this case turn on the fact that the TCPA completely preempts the purported state law claims and require [sic] Plaintiff to sue in federal court.*

Docket No. 10 at 16-17 (internal citation omitted and emphasis added).

This order does not address the artful pleading issue, because resolution of the preemption issue fully resolves the motion to remand. If Congress intended to completely preempt the Department's state-law claims, The Sports Authority's removal here was proper (without any need to consider whether the Department engaged in artful pleading); if Congress did not intend to preempt the Department's state-law claims, removal was improper (and artful pleading, per The Sports Authority's italicized statement above, could not have occurred here).

II. ANALYSIS

A. Types of Preemption

Pursuant to 28 U.S.C. § 1441(a), a defendant may remove from state court any civil action "of which the district courts of the United States have original jurisdiction"—including, of course, civil actions that raise a federal question. The jurisdictional issue of whether a complaint raises a federal question is governed by the "well-pleaded complaint rule," which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff's properly pleaded complaint. *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1090 (11th Cir. 2002) (citing *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987).

Generally speaking, "the plaintiff is the master of the claim . . . [and] may avoid federal jurisdiction by exclusive reliance on state law." *Behlen*, 311 F.3d at 1090.

The Supreme Court has recognized an "independent corollary" to the well-pleaded complaint rule—the doctrine of complete preemption. Complete preemption can provide a basis for federal jurisdiction (and, by extension, for removal) even if the plaintiff has apparently relied exclusively on state law in drafting its complaint. *Geddes v. American Airlines, Inc.*, 321 F.3d 1349, 1352 (11th Cir. 2003). In essence, complete preemption transforms state-law claims into federal-law claims for purposes of the well-pleaded complaint rule:

> On occasion, the Court has concluded that the pre-emptive force of a statute is so extraordinary that it converts an ordinary state common-law complaint into one stating a federal claim for purposes of the well-pleaded complaint rule. Once an area of state law has been completely pre-empted, any claim purportedly based on that pre-empted state law is considered, from its inception, a federal claim, and therefore arises under federal law.

Caterpillar, Inc. v. Williams, 482 U.S. 386, 393, 107 S. Ct. 2425, 96 L. Ed. 2d 318 (1987) (internal quotations and citations omitted).

The doctrine of complete preemption is related to but differs from the related doctrine of "ordinary preemption." Ordinary preemption provides no basis for federal jurisdiction or removal:

> Preemption is the power of federal law to displace state law substantively. The federal

> preemptive power may be complete, providing a basis for jurisdiction in the federal courts, or it maybe what has been called "ordinary preemption," providing a substantive defense to a state law action on the basis of federal law.

Geddes, 321 F.3d at 1352. Ordinary preemption maybe invoked in either state or federal court as a defense, asserting that the plaintiffs claims have been substantively displaced by federal law. *Id.* at 1353.

B. Finding Complete Preemption

The Supreme Court has cautioned that complete preemption can be found only in statutes with "extraordinary" preemptive force. *Caterpillar,* 482 U.S. at 393. Within this Circuit, this extraordinary preemptive force "must be manifest in the clearly expressed intent of Congress." *Geddes,* 321 F.3d at 1353. Moreover, the United States Court of Appeals for the Eleventh Circuit has advised the district courts that the complete preemption inquiry "turns on the question of whether Congress not only intended for a federal statute to provide a defense to state-law claims, but also intended to confer on defendants the ability to remove a case to a federal forum." *Id.*

In the instant case, a careful reading of the TCPA indicates that Congress neither intended it to provide a defense to state-law claims nor intended it to allow removal of such claims to a federal forum. Subsection (e) of 47 U.S.C. § 227, titled "Effect on State law," provides in pertinent part that

> (1) State law not preempted
>
> Except for the standards prescribed under subsection (d) of this section and subject to

paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic dialing systems;

(C) the use of prerecorded voice messages; or

(D) the making of telephone solicitations.

The two exceptions referred to in the first paragraph of 47 U.S.C. § 227(e)(1) do not apply in the instant case. Subsection (d) of Section 227 prescribes minimum technical and procedural standards for facsimile machines and prerecorded voice systems. The Sports Authority does not contend that the state law at issue here—Fla. Stat. § 501.059—conflicts with those standards. Paragraph (2) of 47 U.S.C. § 227(e) forbids states that establish their own "Do Not Call" databases from failing to incorporate the state residents from the national "Do Not Call" database into the state database. The Sports Authority has not argued that Florida has run afoul of this prohibition.

The state law that The Sports Authority allegedly violated—Fla. Stat. § 501.059—prohibits, in pertinent part, "mak[ing] or knowingly allow[ing] a telephonic sales call to be made if such call in volves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called"—i.e., activities listed in 47 U.S.C.

§ 227(e)(1)(B) and (C). *See* Fla. Stat. § 501.059(7)(a). The Florida statute at issue also prohibits telemarketers from making unsolicited telephone calls to people who have signed up on a "Do Not Call" list—i.e., from "making . . . telephone solicitations," as described in 47 U.S.C. § 227(e)(1)(D). *See* Fla. Stat. § 501.059(4). In other words, while The Sports Authority points to the TCPA as preempting the state-law unsolicited-sales-call and improper-use-of-prerecorded-messages claims against it, the TCPA itself *expressly disavows* any intent to preempt such claims. *See* 47 U.S.C. § 227(e)(1)(B), (C) and (D).

Similarly, 47 U.S.C. § 227(f) disclaims any intent to bar state-law actions, such as this one, brought by the state on behalf of its residents: "Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such state." 47 U.S.C. § 227(f)(6).

The Sports Authority wholly ignores the statutory language quoted above as well as its implications regarding Congressional intent. Rather, The Sports Authority makes two main arguments in support of its contention that Congress has completely pre empted state law regulation of interstate telephone calls. First, The Sports Authority points to various statements, made by the Federal Communications Commission ("FCC"), that the TCPA would likely preempt state laws that differ from those enacted under the TCPA. For example, The Sports Authority asserts that in a 2003 Report and Order amending the TCPA regulations [henceforth, "FCC-03-153"], the FCC "affirmed once again that state laws which differ from the TCPA would almost certainly' be

preempted based on an interest in uniform treatment of interstate calls and Congressional intent." Docket No. 10 at 3. In support of this assertion, The Sports Authority quotes from FCC-03-153:

> Congress enacted section 227 . . . to give the Commission jurisdiction over both interstate and intrastate telemarketing calls. Congress did so based upon the concern that states lack jurisdiction over interstate calls. Although section 227(e) gives states authority to impose more restrictive intrastate regulations, we believe that it was the clear intent of Congress generally to promote a uniform regulatory scheme under which telemarketers would not be subject to multiple, conflicting regulations. We conclude that inconsistent interstate rules frustrate the federal objective of creating uniform national rules, to avoid burdensome compliance costs for telemarketers and potential consumer confusion. . . .
>
> We therefore believe that any state regulation of interstate telemarketing calls that differs from our rules almost certainly would conflict with and frustrate the federal scheme and almost certainly would be preempted.

Id. at §§ 83-84 (paragraph numbers and footnotes omitted).

The Sports Authority, however, neglects to include the following paragraph from the Report and Order, which seriously undercuts its position with regard to state regulation:

> [The National Association of Attorneys General, or NAAG] contends that states have historically enforced telemarketing laws, including do-not-

> call rules, within, as well as across, state lines pursuant to "long-arm" statutes. . . . We note that such "long-arm" statutes may be protected under section 227(f)(6). . . . *Nothing that we do in this order prohibits states from enforcing state regulations that are consistent with the TCPA and the rules established under this order in state court.*

Id. at § 85 (emphasis added). Although The Sports Authority contends that the Florida statute is inconsistent with the TCPA, it fails to demonstrate—or even point to—any actual inconsistencies. As such, the instant suit would fit under the FCC's "exception" articulated in the last sentence of the above-quoted passage.

Even if the Court were to agree with the FCC's assessment of Congressional intent—i.e., that the TCPA was intended to protect telemarketers from being forced to comply with inconsistent state laws—it would not follow that Congress therefore intended to completely preempt such laws. As the *Geddes* court explained, the complete preemption inquiry "turns on the question of whether Congress not only intended for a federal statute to provide a defense to state-law claims, *but also intended to confer on defendants the ability to remove a case to a federal forum.*" *Geddes* at 1353 (emphasis added). An intent to protect telemarketers against inconsistent state laws, standing alone, does not indicate that Congress intended to allow telemarketers to remove these disputes to district court. State courts are fully capable of adjudicating the merits of a federal defense, including the defense of ordinary preemption.

The second primary argument advanced by The Sports Authority involves the state courts' alleged

lack of jurisdiction over the regulation of interstate telephone calls. *See* Docket No. 10 at 2. The Sports Authority contends that state courts lack jurisdiction over state law claims that amount to such regulation due to complete preemption by Congress. *See* Docket No. 10 at 2. Assuming, *arguendo*, that the calls at issue in this case were, in fact, interstate calls (a point not addressed in the complaint), The Sports Authority's argument still fails to demonstrate that this Court has jurisdiction over such claims.

The FCC order itself contradicts The Sports Authority's assertion about the justification for passing the TCPA: "Congress enacted [the TCPA] . . . to give the Commission jurisdiction over both interstate and intrastate telemarketing calls. *Congress did so based upon the concern that states lack jurisdiction over interstate calls.*" FCC-03-153 at 3 (emphasis added). In other words, assuming the FCC is correct, the TCPA could not have preempted state jurisdiction of interstate calls, because states never had such jurisdiction. Also, as noted above, the FCC recognizes that the states implement some "oversight" of interstate phone activity by way of long-arm statutes.

In addition, the TCPA itself at several points contradicts the claim that it was intended to eliminate state court jurisdiction over interstate calls. For example, 47 U.S.C. § 227(b)(3), part of the TCPA subsection dealing with misuse of automated telephone equipment, provides in relevant part that "[a] person or entity may, *if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that state* . . . an action based on a violation of this subsection or the regulations prescribed under this subsection. . ." (emphasis

added). Similarly, the TCPA subsection dealing with violations of the "Do Not Call" registry provides that "[a] person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection *may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State*. . . an action to recover for actual monetary loss from such a violation, or to receive up to $500 in damages for each such violation, whichever is greater". 47 U.S.C. § 227(c)(5).

It is impossible to reconcile The Sports Authority's claim that states lack *any* authority in this area with the above-quoted statutory recognition of (and deference to) such authority. That claim also cannot be reconciled with the TCPA's requirement that private actions for violations of its provisions can only be brought in state court. *See Nicholson v. Hooters of Augusta, Inc.*, 136 F.3d 1287, 1289 (11th Cir. 1998) (joining Fourth and Fifth Circuits in holding that federal courts lack subject matter jurisdiction of private actions under the TCPA").[1] *See also Van*

---

[1] Although 47 U.S.C. § 227(b)(3), 47 U.S.C. § 227(c)(5), and the *Nicholson* case involve private claims—rather than, as here, claims brought by a state agency—their underlying rationale provides guidance as to the intent of Congress in enacting the TCPA. If Congress has not seen fit to completely preempt a certain category of private claims, it suggests that Congress has not preempted those same claims when brought by a state on behalf of its residents. Generally speaking, the question of complete preemption turns on the area of law at issue rather than the identity of the litigants. *See, e.g., Metropolitan Life Ins. v. Taylor*, 481 U.S. 58, 63-64, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) ("Congress may so completely pre-empt a particular area that any civil complaint raising this select group of claims is

Bergen v. Minnesota, 59 F.3d 1541, 1548 (8th Cir. 1995) (rejecting argument that TCPA completely preempted Minnesota telemarketing statute due to lack of express or implied preemption, and absence of actual conflict between the state and federal laws).

III. CONCLUSION

For the foregoing reasons, the Court find that the TCPA does not completely preempt Fla. Stat. § 501.059, and therefore this case was improvidently removed from state court. Accordingly, it is

ORDERED that on Plaintiff's Motion to Remand (Docket No. 7) is GRANTED, and this case is hereby REMANDED back to the Circuit Court in and for Orange County, Florida.

DONE and ORDERED in Orlando, Florida this 4th day of June, 2004.

/s/ James G. Glazebrook
JAMES G. GLAZEBROOK
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
Counsel of Record
Unrepresented Parties

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necessarily federal in character"). In the instant case, telemarketers would be subjected to the same "inconsistent regulation" whether this state-law suit had been brought by a Florida resident or by the state of Florida on behalf of that resident.

APPENDIX G

Constitutional Provision

U.S. Constitution Article VI § 2 reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

APPENDIX H

TITLE 47.—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5.—WIRE OR RADIO COMMUNICATION—COMMON CARRIERS COMMON CARRIER REGULATION

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

47 USCS § 227

§ 227 Restrictions on use of telephone equipment

(a) Definitions. As used in this section—

(1) The term "automatic telephone dialing system" means equipment which has the capacity—

(A) to store or produce telephone numbers to be called, using a random or sequential number generator; and

(B) to dial such numbers.

(2) The term "established business relationship", for purposes only of subsection (b)(1)(C)(i), shall have the meaning given the term in section 64.1200 of title 47, Code of Federal Regulations, as in effect on January 1, 2003, except that—

(A) such term shall include a relationship between a person or entity and a business subscriber subject to the same terms applicable under such section to a relationship between a person or entity and a residential subscriber; and

(B) an established business relationship shall be subject to any time limitation established pursuant to paragraph (2)(G)[)].

(3) The term "telephone facsimile machine" means equipment which has the capacity (A) to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or (B) to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(4) The term "telephone solicitation" means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person, but such term does not include a call or message (A) to any person with that person's prior express invitation or permission, (B) to any person with whom the caller has an established business relationship, or (C) by a tax exempt nonprofit organization.

(5) The term "unsolicited advertisement" means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(b) Restrictions on use of automated telephone equipment. –

(1) Prohibitions. It shall be unlawful for any person within the United States, or any person outside the United States if the recipient is within the United States—

(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or pre-recorded voice—

(i) to any emergency telephone line (including any "911" line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency);

(ii) to the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) to any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier service, or any service for which the called party is charged for the call;

(B) to initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph (2)(B);

(C) to use any telephone facsimile machine, computer, or other device to send, to a telephone facsimile machine, an unsolicited advertisement, unless—

(i) the unsolicited advertisement is from a sender with an established business relationship with the recipient;

(ii) the sender obtained the number of the telephone facsimile machine through—

(I) the voluntary communication of such number, within the context of such established business relationship, from the recipient of the unsolicited advertisement, or

(II) a directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution, except that this clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before the date of enactment of the Junk Fax Prevention Act of 2005 [enacted July 9, 2005] if the sender possessed the facsimile machine number of the recipient before such date of enactment; and

(iii) the unsolicited advertisement contains a notice meeting the requirements under paragraph (2)(D), except that the exception under clauses (i) and (ii) shall not apply with respect to an unsolicited advertisement sent to a telephone facsimile machine by a sender to whom a request has been made not to send future unsolicited advertisements to such telephone facsimile machine that complies with the requirements under paragraph (2)(E); or

(D) to use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(2) Regulations; exemptions and other provisions. The Commission shall prescribe regulations to implement the requirements of this subsection. In implementing the requirements of this subsection, the Commission—

(A) shall consider prescribing regulations to allow businesses to avoid receiving calls made using an artificial or prerecorded voice to which they have not given their prior express consent;

(B) may, by rule or order, exempt from the requirements of paragraph (1)(B) of this subsection,

subject to such conditions as the Commission may prescribe—

(i) calls that are not made for a commercial purpose; and

(ii) such classes or categories of calls made for commercial purposes as the Commission determines—

(I) will not adversely affect the privacy rights that this section is intended to protect; and

(II) do not include the transmission of any unsolicited advertisement;

(C) may, by rule or order, exempt from the requirements of paragraph (1)(A)(iii) of this subsection calls to a telephone number assigned to a cellular telephone service that are not charged to the called party, subject to such conditions as the Commission may prescribe as necessary in the interest of the privacy rights this section is intended to protect;

(D) shall provide that a notice contained in an unsolicited advertisement complies with the requirements under this subparagraph only if—

(i) the notice is clear and conspicuous and on the first page of the unsolicited advertisement;

(ii) the notice states that the recipient may make a request to the sender of the unsolicited advertisement not to send any future unsolicited advertisements to a telephone facsimile machine or machines and that failure to comply, within the shortest reasonable time, as determined by the Commission, with such a request meeting the requirements under subparagraph (E) is unlawful;

(iii) the notice sets forth the requirements for a request under subparagraph (E);

(iv) the notice includes—

(I) a domestic contact telephone and facsimile machine number for the recipient to transmit such a request to the sender; and

(II) a cost-free mechanism for a recipient to transmit a request pursuant to such notice to the sender of the unsolicited advertisement; the Commission shall by rule require the sender to provide such a mechanism and may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, exempt certain classes of small business senders, but only if the Commission determines that the costs to such class are unduly burdensome given the revenues generated by such small businesses;

(v) the telephone and facsimile machine numbers and the cost-free mechanism set forth pursuant to clause (iv) permit an individual or business to make such a request at any time on any day of the week; and

(vi) the notice complies with the requirements of subsection (d);

(E) shall provide, by rule, that a request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(i) the request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(ii) the request is made to the telephone or facsimile number of the sender of such an unsolicited

advertisement provided pursuant to subparagraph (D)(iv) or by any other method of communication as determined by the Commission; and

(iii) the person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine;

(F) may, in the discretion of the Commission and subject to such conditions as the Commission may prescribe, allow professional or trade associations that are tax-exempt nonprofit organizations to send unsolicited advertisements to their members in furtherance of the association's tax-exempt purpose that do not contain the notice required by paragraph (1)(C)(iii), except that the Commission may take action under this subparagraph only—

(i) by regulation issued after public notice and opportunity for public comment; and

(ii) if the Commission determines that such notice required by paragraph (1)(C)(iii) is not necessary to protect the ability of the members of such associations to stop such associations from sending any future unsolicited advertisements; and

(G)

(i) may, consistent with clause (ii), limit the duration of the existence of an established business relationship, however, before establishing any such limits, the Commission shall—

(I) determine whether the existence of the exception under paragraph (1)(C) relating to an established business relationship has resulted in a significant number of complaints to the Commission

regarding the sending of unsolicited advertisements to telephone facsimile machines;

(II) determine whether a significant number of any such complaints involve unsolicited advertisements that were sent on the basis of an established business relationship that was longer in duration than the Commission believes is consistent with the reasonable expectations of consumers;

(III) evaluate the costs to senders of demonstrating the existence of an established business relationship within a specified period of time and the benefits to recipients of establishing a limitation on such established business relationship; and

(IV) determine whether with respect to small businesses, the costs would not be unduly burdensome; and

(ii) may not commence a proceeding to determine whether to limit the duration of the existence of an established business relationship before the expiration of the 3-month period that begins on the date of the enactment of the Junk Fax Prevention Act of 2005 [enacted July 9, 2005].

(3) Private right of action. A person or entity may, if otherwise permitted by the laws or rules of court of a State, bring in an appropriate court of that State—

(A) an action based on a violation of this subsection or the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

If the court finds that the defendant willfully or knowingly violated this subsection or the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(c) Protection of subscriber privacy rights.

(1) Rulemaking proceeding required. Within 120 days after the date of enactment of this section [enacted Dec. 20, 1991], the Commission shall initiate a rulemaking proceeding concerning the need to protect residential telephone subscribers' privacy rights to avoid receiving telephone solicitations to which they object. The proceeding shall—

(A) compare and evaluate alternative methods and procedures (including the use of electronic databases, telephone network technologies, special directory markings, industry-based or company-specific 'do not call' systems, and any other alternatives, individually or in combination) for their effectiveness in protecting such privacy rights, and in terms of their cost and other advantages and disadvantages;

(B) evaluate the categories of public and private entities that would have the capacity to establish and administer such methods and procedures;

(C) consider whether different methods and procedures may apply for local telephone solicitations, such as local telephone solicitations of small businesses or holders of second class mail permits;

(D) consider whether there is a need for additional Commission authority to further restrict telephone solicitations, including those calls exempted under subsection (a)(3) of this section, and, if such a

finding is made and supported by the record, propose specific restrictions to the Congress; and

(E) develop proposed regulations to implement the methods and procedures that the Commission determines are most effective and efficient to accomplish the purposes of this section.

(2) Regulations. Not later than 9 months after the date of enactment of this section [enacted Dec. 20, 1991], the Commission shall conclude the rulemaking proceeding initiated under paragraph (1) and shall prescribe regulations to implement methods and procedures for protecting the privacy rights described in such paragraph in an efficient, effective, and economic manner and without the imposition of any additional charge to telephone subscribers.

(3) Use of database permitted. The regulations required by paragraph (2) may require the establishment and operation of a single national database to compile a list of telephone numbers of residential subscribers who object to receiving telephone solicitations, and to make that compiled list and parts thereof available for purchase. If the Commission determines to require such a database, such regulations shall—

(A) specify a method by which the Commission will select an entity to administer such database;

(B) require each common carrier providing telephone exchange service, in accordance with regulations prescribed by the Commission, to inform subscribers for telephone exchange service of the opportunity to provide notification, in accordance with regulations established under this paragraph, that such subscriber objects to receiving telephone solicitations;

(C) specify the methods by which each telephone subscriber shall be informed, by the common carrier that provides local exchange service to that subscriber, of (i) the subscriber's right to give or revoke a notification of an objection under subparagraph (A), and (ii) the methods by which such right may be exercised by the subscriber;

(D) specify the methods by which such objections shall be collected and added to the database;

(E) prohibit any residential subscriber from being charged for giving or revoking such notification or for being included in a database compiled under this section;

(F) prohibit any person from making or transmitting a telephone solicitation to the telephone number of any subscriber included in such database;

(G) specify (i) the methods by which any person desiring to make or transmit telephone solicitations will obtain access to the database, by area code or local exchange prefix, as required to avoid calling the telephone numbers of subscribers included in such database; and (ii) the costs to be recovered from such persons;

(H) specify the methods for recovering, from persons accessing such database, the costs involved in identifying, collecting, updating, disseminating, and selling, and other activities relating to, the operations of the database that are incurred by the entities carrying out those activities;

(I) specify the frequency with which such database will be updated and specify the method by which such updating will take effect for purposes of compliance with the regulations prescribed under this subsection;

(J) be designed to enable States to use the database mechanism selected by the Commission for purposes of administering or enforcing State law;

(K) prohibit the use of such database for any purpose other than compliance with the requirements of this section and any such State law and specify methods for protection of the privacy rights of persons whose numbers are included in such database; and

(L) require each common carrier providing services to any person for the purpose of making telephone solicitations to notify such person of the requirements of this section and the regulations thereunder.

(4) Considerations required for use of database method. If the Commission determines to require the database mechanism described in paragraph (3), the Commission shall—

(A) in developing procedures for gaining access to the database, consider the different needs of telemarketers conducting business on a national, regional, State, or local level;

(B) develop a fee schedule or price structure for recouping the cost of such database that recognizes such differences and—

(i) reflect the relative costs of providing a national, regional, State, or local list of phone numbers of subscribers who object to receiving telephone solicitations;

(ii) reflect the relative costs of providing such lists on paper or electronic media; and

(iii) not place an unreasonable financial burden on small businesses; and

(C) consider (i) whether the needs of telemarketers operating on a local basis could be met through special markings of area white pages directories, and (ii) if such directories are needed as an adjunct to database lists prepared by area code and local exchange prefix.

(5) Private right of action. A person who has received more than one telephone call within any 12-month period by or on behalf of the same entity in violation of the regulations prescribed under this subsection may, if otherwise permitted by the laws or rules of court of a State bring in an appropriate court of that State—

(A) an action based on a violation of the regulations prescribed under this subsection to enjoin such violation,

(B) an action to recover for actual monetary loss from such a violation, or to receive up to $ 500 in damages for each such violation, whichever is greater, or

(C) both such actions.

It shall be an affirmative defense in any action brought under this paragraph that the defendant has established and implemented, with due care, reasonable practices and procedures to effectively prevent telephone solicitations in violation of the regulations prescribed under this subsection. If the court finds that the defendant willfully or knowingly violated the regulations prescribed under this subsection, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under subparagraph (B) of this paragraph.

(6) Relation to subsection (b). The provisions of this subsection shall not be construed to permit a communication prohibited by subsection (b).

(d) Technical and procedural standards.

(1) Prohibition. It shall be unlawful for any person within the United States—

(A) to initiate any communication using a telephone facsimile machine, or to make any telephone call using any automatic telephone dialing system, that does not comply with the technical and procedural standards prescribed under this subsection, or to use any telephone facsimile machine or automatic telephone dialing system in a manner that does not comply with such standards; or

(B) to use a computer or other electronic device to send any message via a telephone facsimile machine unless such person clearly marks, in a margin at the top or bottom of each transmitted page of the message or on the first page of the transmission, the date and time it is sent and an identification of the business, other entity, or individual sending the message and the telephone number of the sending machine or of such business, other entity, or individual.

(2) Telephone facsimile machines. The Commission shall revise the regulations setting technical and procedural standards for telephone facsimile machines to require that any such machine which is manufactured after one year after the date of enactment of this section clearly marks, in a margin at the top or bottom of each transmitted page or on the first page of each transmission, the date and time sent, an identification of the business, other entity, or individual sending the message, and the telephone num-

ber of the sending machine or of such business, other entity, or individual.

(3) Artificial or prerecorded voice systems. The Commission shall prescribe technical and procedural standards for systems that are used to transmit any artificial or prerecorded voice message via telephone. Such standards shall require that—

(A) all artificial or prerecorded telephone messages (i) shall, at the beginning of the message, state clearly the identity of the business, individual, or other entity initiating the call, and (ii) shall, during or after the message, state clearly the telephone number or address of such business, other entity, or individual; and

(B) any such system will automatically release the called party's line within 5 seconds of the time notification is transmitted to the system that the called party has hung up, to allow the called party's line to be used to make or receive other calls.

(e) Effect on State law.

(1) State law not preempted. Except for the standards prescribed under subsection (d) and subject to paragraph (2) of this subsection, nothing in this section or in the regulations prescribed under this section shall preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits—

(A) the use of telephone facsimile machines or other electronic devices to send unsolicited advertisements;

(B) the use of automatic telephone dialing systems;

(C) the use of artificial or prerecorded voice messages; or

(D) the making of telephone solicitations.

(2) State use of databases. If, pursuant to subsection (c)(3), the Commission requires the establishment of a single national database of telephone numbers of subscribers who object to receiving telephone solicitations, a State or local authority may not, in its regulation of telephone solicitations, require the use of any database, list, or listing system that does not include the part of such single national database that relates to such State.

(f) Actions by States.

(1) Authority of States. Whenever the attorney general of a State, or an official or agency designated by a State, has reason to believe that any person has engaged or is engaging in a pattern or practice of telephone calls or other transmissions to residents of that State in violation of this section or the regulations prescribed under this section, the State may bring a civil action on behalf of its residents to enjoin such calls, an action to recover for actual monetary loss or receive $ 500 in damages for each violation, or both such actions. If the court finds the defendant willfully or knowingly violated such regulations, the court may, in its discretion, increase the amount of the award to an amount equal to not more than 3 times the amount available under the preceding sentence.

(2) Exclusive jurisdiction of Federal courts. The district courts of the United States, the United States courts of any territory, and the District Court of the United States for the District of Columbia shall have exclusive jurisdiction over all civil actions brought

under this subsection. Upon proper application, such courts shall also have jurisdiction to issue writs of mandamus, or orders affording like relief, commanding the defendant to comply with the provisions of this section or regulations prescribed under this section, including the requirement that the defendant take such action as is necessary to remove the danger of such violation. Upon a proper showing, a permanent or temporary injunction or restraining order shall be granted without bond.

(3) Rights of Commission. The State shall serve prior written notice of any such civil action upon the Commission and provide the Commission with a copy of its complaint, except in any case where such prior notice is not feasible, in which case the State shall serve such notice immediately upon instituting such action. The Commission shall have the right (A) to intervene in the action, (B) upon so intervening, to be heard on all matters arising therein, and (C) to file petitions for appeal.

(4) Venue; service of process. Any civil action brought under this subsection in a district court of the United States may be brought in the district wherein the defendant is found or is an inhabitant or transacts business or wherein the violation occurred or is occurring, and process in such cases may be served in any district in which the defendant is an inhabitant or where the defendant may be found.

(5) Investigatory powers. For purposes of bringing any civil action under this subsection, nothing in this section shall prevent the attorney general of a State, or an official or agency designated by a State, from exercising the powers conferred on the attorney general or such official by the laws of such State to conduct investigations or to administer oaths or

affirmations or to compel the attendance of witnesses or the production of documentary and other evidence.

(6) Effect on State court proceedings. Nothing contained in this subsection shall be construed to prohibit an authorized State official from proceeding in State court on the basis of an alleged violation of any general civil or criminal statute of such State.

(7) Limitation. Whenever the Commission has instituted a civil action for violation of regulations prescribed under this section, no State may, during the pendency of such action instituted by the Commission, subsequently institute a civil action against any defendant named in the Commission's complaint for any violation as alleged in the Commission's complaint.

(8) Definition. As used in this subsection, the term "attorney general" means the chief legal officer of a State.

(g) Junk fax enforcement report. The Commission shall submit an annual report to Congress regarding the enforcement during the past year of the provisions of this section relating to sending of unsolicited advertisements to telephone facsimile machines, which report shall include—

(1) the number of complaints received by the Commission during such year alleging that a consumer received an unsolicited advertisement via telephone facsimile machine in violation of the Commission's rules;

(2) the number of citations issued by the Commission pursuant to section 503 [47 USCS § 503] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(3) the number of notices of apparent liability issued by the Commission pursuant to section 503 [47 USCS § 503] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(4) for each notice referred to in paragraph (3)—

(A) the amount of the proposed forfeiture penalty involved;

(B) the person to whom the notice was issued;

(C) the length of time between the date on which the complaint was filed and the date on which the notice was issued; and

(D) the status of the proceeding;

(5) the number of final orders imposing forfeiture penalties issued pursuant to section 503 [47 USCS § 503] during the year to enforce any law, regulation, or policy relating to sending of unsolicited advertisements to telephone facsimile machines;

(6) for each forfeiture order referred to in paragraph (5)—

(A) the amount of the penalty imposed by the order;

(B) the person to whom the order was issued;

(C) whether the forfeiture penalty has been paid; and

(D) the amount paid;

(7) for each case in which a person has failed to pay a forfeiture penalty imposed by such a final order, whether the Commission referred such matter for recovery of the penalty; and

(8) for each case in which the Commission referred such an order for recovery—

(A) the number of days from the date the Commission issued such order to the date of such referral;

(B) whether an action has been commenced to recover the penalty, and if so, the number of days from the date the Commission referred such order for recovery to the date of such commencement; and

(C) whether the recovery action resulted in collection of any amount, and if so, the amount collected.

History:

(June 19, 1934, ch 652, Title II, § 227, as added Dec. 20, 1991, P.L. 102-243, § 3, 105 Stat. 2395; Oct. 28, 1992, P.L. 102-556, Title IV, § 402, 106 Stat. 4194; Oct. 25, 1994, P.L. 103-414, Title III, § 303(a)(11), (12), 108 Stat. 4294.) (As amended Dec. 16, 2003, P.L. 108-187, § 12, 117 Stat. 2717; July 9, 2005, P.L. 109-21, §§ 2(a)-(g), 3, 119 Stat. 359, 362.)

APPENDIX I

TITLE 33.—REGULATION OF TRADE, COMMERCE, INVESTMENTS, AND SOLICITATIONS (Chs. 494-560)

CHAPTER 501.—CONSUMER PROTECTION PART I. GENERAL PROVISIONS

GO TO FLORIDA STATUTES ARCHIVE DIRECTORY

Fla. Stat. § 501.059 (2007)

§ 501.059. Telephone solicitation

(1) As used in this section:

(a) "Telephonic sales call" means a call made by a telephone solicitor to a consumer, for the purpose of soliciting a sale of any consumer goods or services, or for the purpose of soliciting an extension of credit for consumer goods or services, or for the purpose of obtaining information that will or may be used for the direct solicitation of a sale of consumer goods or services or an extension of credit for such purposes.

(b) "Consumer goods or services" means any real property or any tangible or intangible personal property which is normally used for personal, family, or household purposes, including, without limitation, any such property intended to be attached to or installed in any real property without regard to whether it is so attached or installed, as well as cemetery lots and timeshare estates, and any services related to such property.

(c) "Unsolicited telephonic sales call" means a telephonic sales call other than a call made:

1. In response to an express request of the person called;

2. Primarily in connection with an existing debt or contract, payment or performance of which has not been completed at the time of such call;

3. To any person with whom the telephone solicitor has a prior or existing business relationship; or

4. By a newspaper publisher or his or her agent or employee in connection with his or her business.

(d) "Commission" means the Florida Public Service Commission.

(e) "Telephone solicitor" means any natural person, firm, organization, partnership, association, or corporation, or a subsidiary or affiliate thereof, doing business in this state, who makes or causes to be made a telephonic sales call, including, but not limited to, calls made by use of automated dialing or recorded message devices.

(f) "Consumer" means an actual or prospective purchaser, lessee, or recipient of consumer goods or services.

(g) "Merchant" means a person who, directly or indirectly, offers or makes available to consumers any consumer goods or services.

(h) "Doing business in this state" refers to businesses who conduct telephonic sales calls from a location in Florida or from other states or nations to consumers located in Florida.

(i) "Department" means the Department of Agriculture and Consumer Services.

(2) Any telephone solicitor who makes an unsolicited telephonic sales call to a residential, mobile, or

telephonic paging device telephone number shall identify himself or herself by his or her true first and last names and the business on whose behalf he or she is soliciting immediately upon making contact by telephone with the person who is the object of the telephone solicitation.

(3)(a) Any residential, mobile, or telephonic paging device telephone subscriber desiring to be placed on a "no sales solicitation calls" listing indicating that the subscriber does not wish to receive unsolicited telephonic sales calls may notify the department and be placed on that listing upon receipt by the department of a $ 10 initial listing charge. This listing shall be renewed by the department annually for each consumer upon receipt of a renewal notice and a $ 5 assessment.

(b) The department shall update its "no sales solicitation calls" listing upon receipt of initial consumer subscriptions or renewals and provide this listing for a fee to telephone solicitors upon request.

(c) All fees imposed pursuant to this section shall be deposited in the General Inspection Trust Fund for the administration of this section.

(4) No telephone solicitor shall make or cause to be made any unsolicited telephonic sales call to any residential, mobile, or telephonic paging device telephone number if the number for that telephone appears in the then-current quarterly listing published by the department. Any telephone solicitor or person who offers for sale any consumer information which includes residential, mobile, or telephonic paging device telephone numbers, except directory assistance and telephone directories sold by telephone companies and organizations exempt under s. 501(c)(3)

or (6) of the Internal Revenue Code, shall screen and exclude those numbers which appear on the division's then-current "no sales solicitation calls" list. This subsection does not apply to any person licensed pursuant to chapter 475 who calls an actual or prospective seller or lessor of real property when such call is made in response to a yard sign or other form of advertisement placed by the seller or lessor.

(5)(a) A contract made pursuant to a telephonic sales call is not valid and enforceable against a consumer unless made in compliance with this subsection.

(b) A contract made pursuant to a telephonic sales call:

1. Shall be reduced to writing and signed by the consumer.

2. Shall comply with all other applicable laws and rules.

3. Shall match the description of goods or services as principally used in the telephone solicitations.

4. Shall contain the name, address, and telephone number of the seller, the total price of the contract, and a detailed description of the goods or services being sold.

5. Shall contain, in bold, conspicuous type, immediately preceding the signature, the following statement:

"You are not obligated to pay any money unless you sign this contract and return it to the seller."

6. May not exclude from its terms any oral or written representations made by the telephone so-

licitor to the consumer in connection with the transaction.

(c) The provisions of this subsection do not apply to contractual sales regulated under other sections of the Florida Statutes, or to the sale of financial services, security sales, or sales transacted by companies or their wholly owned subsidiaries or agents, which companies are regulated by chapter 364, or to the sale of cable television services to the duly franchised cable television operator's existing subscribers within that cable television operator's franchise area, or to any sales where no prior payment is made to the merchant and an invoice accompanies the goods or services allowing the consumer 7 days to cancel or return without obligation for any payment.

(6)(a) A merchant who engages a telephone solicitor to make or cause to be made a telephonic sales call shall not make or submit any charge to the consumer's credit card account or make or cause to be made any electronic transfer of funds until after the merchant receives from the consumer a copy of the contract, signed by the purchaser, which complies with this section.

(b) A merchant who conducts a credit card account transaction pursuant to this section shall be subject to the provisions of.

(c) The provisions of this subsection do not apply to a transaction:

1. Made in accordance with prior negotiations in the course of a visit by the consumer to a merchant operating a retail business establishment which has a fixed permanent location and where consumer goods are displayed or offered for sale on a continuing basis;

2. In which the consumer may obtain a full refund for the return of undamaged and unused goods or a cancellation of services notice to the seller within 7 days after receipt by the consumer, and the seller will process the refund within 30 days after receipt of the returned merchandise by the consumer;

3. In which the consumer purchases goods or services pursuant to an examination of a television, radio, or print advertisement or a sample, brochure, or catalog of the merchant that contains:

a. The name, address, and telephone number of the merchant;

b. A description of the goods or services being sold; and

c. Any limitations or restrictions that apply to the offer; or

4. In which the merchant is a bona fide charitable organization or a newspaper as defined in chapter 50.

(7)(a) No person shall make or knowingly allow a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called.

(b) Nothing herein prohibits the use of an automated telephone dialing system with live messages if the calls are made or messages given solely in response to calls initiated by the persons to whom the automatic calls or live messages are directed or if the telephone numbers selected for automatic dialing have been screened to exclude any telephone subscriber who is included on the department's then-current "no

sales solicitation calls" listing or any unlisted telephone number, or if the calls made concern goods or services that have been previously ordered or purchased.

(c) It shall be unlawful for any person who makes a telephonic sales call or causes a telephonic sales call to be made to fail to transmit or cause not to be transmitted the telephone number and, when made available by the telephone solicitor's carrier, the name of the telephone solicitor to any caller identification service in use by a recipient of a telephonic sales call. However, it shall not be a violation to substitute, for the name and telephone number used in or billed for making the call, the name of the seller on behalf of which a telephonic sales call is placed and the seller's customer service telephone number, which is answered during regular business hours. For purposes of this section, the term "caller identification service" means a service that allows a telephone subscriber to have the telephone number and, where available, the name of the calling party transmitted contemporaneously with the telephone call and displayed on a device in or connected to the subscriber's telephone.

(d) It shall be unlawful for any person who makes a telephonic sales call or causes a telephonic sales call to be made to intentionally alter the voice of the caller in an attempt to disguise or conceal the identity of the caller in order to defraud, confuse, or financially or otherwise injure the recipient of a telephonic sales call or in order to obtain personal information from the recipient of a telephonic sales call which may be used in a fraudulent or unlawful manner.

(8) The department shall investigate any complaints received concerning violations of this section. If, after investigating any complaint, the department

finds that there has been a violation of this section, the department or the Department of Legal Affairs may bring an action to impose a civil penalty and to seek other relief, including injunctive relief, as the court deems appropriate against the telephone solicitor. The civil penalty shall not exceed $ 10,000 per violation and shall be deposited in the General Inspection Trust Fund if the action or proceeding was brought by the department, or the Legal Affairs Revolving Trust Fund if the action or proceeding was brought by the Department of Legal Affairs. This civil penalty may be recovered in any action brought under this part by the department, or the department may terminate any investigation or action upon agreement by the person to pay a stipulated civil penalty. The department or the court may waive any civil penalty if the person has previously made full restitution or reimbursement or has paid actual damages to the consumers who have been injured by the violation.

(9)(a) In any civil litigation resulting from a transaction involving a violation of this section, the prevailing party, after judgment in the trial court and exhaustion of all appeals, if any, shall receive his or her reasonable attorney's fees and costs from the nonprevailing party.

(b) The attorney for the prevailing party shall submit a sworn affidavit of his or her time spent on the case and his or her costs incurred for all the motions, hearings, and appeals to the trial judge who presided over the civil case.

(c) The trial judge shall award the prevailing party the sum of reasonable costs incurred in the action plus a reasonable legal fee for the hours actually spent on the case as sworn to in an affidavit.

(d) Any award of attorney's fees or costs shall become a part of the judgment and subject to execution as the law allows.

(e) In any civil litigation initiated by the department or the Department of Legal Affairs, the court may award to the prevailing party reasonable attorney's fees and costs if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party or if the court finds bad faith on the part of the losing party.

(10) The commission shall by rule ensure that telecommunications companies inform their customers of the provisions of this section. The notification may be made by:

(a) Annual inserts in the billing statements mailed to customers; and

(b) Conspicuous publication of the notice in the consumer information pages of the local telephone directories.

History:

§ 1, ch. 87-253; § 1, ch. 90-143; §§ 3, 5, ch. 91-237; § 1, ch. 92-186; § 59, ch. 92-291; § 3, ch. 94-298; § 616, ch. 97-103; § 4, ch. 2003-179; § 4, ch. 2006-165, eff. July 1, 2006.

APPENDIX J

TITLE 47—TELECOMMUNICATION

CHAPTER I—FEDERAL COMMUNICATIONS COMMISSION

SUBCHAPTER B—COMMON CARRIER SERVICES

PART 64—MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

SUBPART L—RESTRICTIONS ON TELEMARKETING, TELEPHONE SOLICITATION, AND FACSIMILE ADVERTISING

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47 CFR 64.1200

§ 64.1200 Delivery restrictions.

(a) No person or entity may:

(1) Initiate any telephone call (other than a call made for emergency purposes or made with the prior express consent of the called party) using an automatic telephone dialing system or an artificial or prerecorded voice;

(i) To any emergency telephone line, including any 911 line and any emergency line of a hospital, medical physician or service office, health care facility, poison control center, or fire protection or law enforcement agency;

(ii) To the telephone line of any guest room or patient room of a hospital, health care facility, elderly home, or similar establishment; or

(iii) To any telephone number assigned to a paging service, cellular telephone service, specialized mobile radio service, or other radio common carrier

service, or any service for which the called party is charged for the call.

(iv) A person will not be liable for violating the prohibition in paragraph (a)(1)(iii) of this section when the call is placed to a wireless number that has been ported from wireline service and such call is a voice call; not knowingly made to a wireless number; and made within 15 days of the porting of the number from wireline to wireless service, provided the number is not already on the national do-not-call registry or caller's company-specific do-not-call list.

(2) Initiate any telephone call to any residential line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party, unless the call;

(i) Is made for emergency purposes;

(ii) Is not made for a commercial purpose;

(iii) Is made for a commercial purpose but does not include or introduce an unsolicited advertisement or constitute a telephone solicitation;

(iv) Is made to any person with whom the caller has an established business relationship at the time the call is made; or

(v) Is made by or on behalf of a tax-exempt nonprofit organization.

(3) Use a telephone facsimile machine, computer, or other device to send an unsolicited advertisement to a telephone facsimile machine, unless—

(i) The unsolicited advertisement is from a sender with an established business relationship, as defined in paragraph (f)(5) of this section, with the recipient; and

(ii) The sender obtained the number of the telephone facsimile machine through—

(A) The voluntary communication of such number by the recipient directly to the sender, within the context of such established business relationship; or

(B) A directory, advertisement, or site on the Internet to which the recipient voluntarily agreed to make available its facsimile number for public distribution. If a sender obtains the facsimile number from the recipient's own directory, advertisement, or Internet site, it will be presumed that the number was voluntarily made available for public distribution, unless such materials explicitly note that unsolicited advertisements are not accepted at the specified facsimile number. If a sender obtains the facsimile number from other sources, the sender must take reasonable steps to verify that the recipient agreed to make the number available for public distribution.

(C) This clause shall not apply in the case of an unsolicited advertisement that is sent based on an established business relationship with the recipient that was in existence before July 9, 2005 if the sender also possessed the facsimile machine number of the recipient before July 9, 2005. There shall be a rebuttable presumption that if a valid established business relationship was formed prior to July 9, 2005, the sender possessed the facsimile number prior to such date as well; and

(iii) The advertisement contains a notice that informs the recipient of the ability and means to avoid future unsolicited advertisements. A notice contained in an advertisement complies with the requirements under this paragraph only if—

(A) The notice is clear and conspicuous and on the first page of the advertisement;

(B) The notice states that the recipient may make a request to the sender of the advertisement not to send any future advertisements to a telephone facsimile machine or machines and that failure to comply, within 30 days, with such a request meeting the requirements under paragraph (a)(3)(v) of this section is unlawful;

(C) The notice sets forth the requirements for an opt-out request under paragraph (a)(3)(v) of this section;

(D) The notice includes—

(1) A domestic contact telephone number and facsimile machine number for the recipient to transmit such a request to the sender; and

(2) If neither the required telephone number nor facsimile machine number is a toll-free number, a separate cost-free mechanism including a Web site address or e-mail address, for a recipient to transmit a request pursuant to such notice to the sender of the advertisement. A local telephone number also shall constitute a cost-free mechanism so long as recipients are local and will not incur any long distance or other separate charges for calls made to such number; and

(E) The telephone and facsimile numbers and cost-free mechanism identified in the notice must permit an individual or business to make an opt-out request 24 hours a day, 7 days a week.

(iv) A facsimile advertisement that is sent to a recipient that has provided prior express invitation or permission to the sender must include an opt-out

notice that complies with the requirements in paragraph (a)(3)(iii) of this section.

(v) A request not to send future unsolicited advertisements to a telephone facsimile machine complies with the requirements under this subparagraph only if—

(A) The request identifies the telephone number or numbers of the telephone facsimile machine or machines to which the request relates;

(B) The request is made to the telephone number, facsimile number, Web site address or e-mail address identified in the sender's facsimile advertisement; and

(C) The person making the request has not, subsequent to such request, provided express invitation or permission to the sender, in writing or otherwise, to send such advertisements to such person at such telephone facsimile machine.

(vi) A sender that receives a request not to send future unsolicited advertisements that complies with paragraph (a)(3)(v) of this section must honor that request within the shortest reasonable time from the date of such request, not to exceed 30 days, and is prohibited from sending unsolicited advertisements to the recipient unless the recipient subsequently provides prior express invitation or permission to the sender. The recipient's opt-out request terminates the established business relationship exemption for purposes of sending future unsolicited advertisements. If such requests are recorded or maintained by a party other than the sender on whose behalf the unsolicited advertisement is sent, the sender will be liable for any failures to honor the opt-out request.

(vii) A facsimile broadcaster will be liable for violations of paragraph (a)(3) of this section, including the inclusion of opt-out notices on unsolicited advertisements, if it demonstrates a high degree of involvement in, or actual notice of, the unlawful activity and fails to take steps to prevent such facsimile transmissions.

(4) Use an automatic telephone dialing system in such a way that two or more telephone lines of a multi-line business are engaged simultaneously.

(5) Disconnect an unanswered telemarketing call prior to at least 15 seconds or four (4) rings.

(6) Abandon more than three percent of all telemarketing calls that are answered live by a person, or measured over a 30-day period. A call is "abandoned" if it is not connected to a live sales representative within two (2) seconds of the called person's completed greeting. Whenever a sales representative is not available to speak with the person answering the call, that person must receive, within two (2) seconds after the called person's completed greeting, a prerecorded identification message that states only the name and telephone number of the business, entity, or individual on whose behalf the call was placed, and that the call was for "telemarketing purposes." The telephone number so provided must permit any individual to make a do-not-call request during regular business hours for the duration of the telemarketing campaign. The telephone number may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. The seller or telemarketer must maintain records establishing compliance with paragraph (a)(6) of this section.

(i) A call for telemarketing purposes that delivers an artificial or prerecorded voice message to a residential telephone line that is assigned to a person who either has granted prior express consent for the call to be made or has an established business relationship with the caller shall not be considered an abandoned call if the message begins within two (2) seconds of the called person's completed greeting.

(ii) Calls made by or on behalf of tax-exempt nonprofit organizations are not covered by paragraph (a)(6) of this section.

(7) Use any technology to dial any telephone number for the purpose of determining whether the line is a facsimile or voice line.

(b) All artificial or prerecorded telephone messages shall:

(1) At the beginning of the message, state clearly the identity of the business, individual, or other entity that is responsible for initiating the call. If a business is responsible for initiating the call, the name under which the entity is registered to conduct business with the State Corporation Commission (or comparable regulatory authority) must be stated, and

(2) During or after the message, state clearly the telephone number (other than that of the autodialer or prerecorded message player that placed the call) of such business, other entity, or individual. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges. For telemarketing messages to residential telephone subscribers, such telephone number must permit any individual to make a do-not-call request during

regular business hours for the duration of the telemarketing campaign.

(c) No person or entity shall initiate any telephone solicitation, as defined in paragraph (f)(12) of this section, to:

(1) Any residential telephone subscriber before the hour of 8 a.m. or after 9 p.m. (local time at the called party's location), or

(2) A residential telephone subscriber who has registered his or her telephone number on the national do-not-call registry of persons who do not wish to receive telephone solicitations that is maintained by the federal government. Such do-not-call registrations must be honored for a period of 5 years. Any person or entity making telephone solicitations (or on whose behalf telephone solicitations are made) will not be liable for violating this requirement if:

(i) It can demonstrate that the violation is the result of error and that as part of its routine business practice, it meets the following standards:

(A) Written procedures. It has established and implemented written procedures to comply with the national do-not-call rules;

(B) Training of personnel. It has trained its personnel, and any entity assisting in its compliance, in procedures established pursuant to the national do-not-call rules;

(C) Recording. It has maintained and recorded a list of telephone numbers that the seller may not contact;

(D) Accessing the national do-not-call database. It uses a process to prevent telephone solicitations to any telephone number on any list

established pursuant to the do-not-call rules, employing a version of the national do-not-call registry obtained from the administrator of the registry no more than 31 days prior to the date any call is made, and maintains records documenting this process.

Note to paragraph (c)(2)(i)(D): The requirement in paragraph 64.1200(c)(2)(i)(D) for persons or entities to employ a version of the national do-not-call registry obtained from the administrator no more than 31 days prior to the date any call is made is effective January 1, 2005. Until January 1, 2005, persons or entities must continue to employ a version of the registry obtained from the administrator of the registry no more than three months prior to the date any call is made.

(E) Purchasing the national do-not-call database. It uses a process to ensure that it does not sell, rent, lease, purchase or use the national do-not-call database, or any part thereof, for any purpose except compliance with this section and any such state or federal law to prevent telephone solicitations to telephone numbers registered on the national database. It purchases access to the relevant do-not-call data from the administrator of the national database and does not participate in any arrangement to share the cost of accessing the national database, including any arrangement with telemarketers who may not divide the costs to access the national database among various client sellers; or

(ii) It has obtained the subscriber's prior express invitation or permission. Such permission must be evidenced by a signed, written agreement between the consumer and seller which states that the consumer agrees to be contacted by this seller and

includes the telephone number to which the calls may be placed; or

(iii) The telemarketer making the call has a personal relationship with the recipient of the call.

(d) No person or entity shall initiate any call for telemarketing purposes to a residential telephone subscriber unless such person or entity has instituted procedures for maintaining a list of persons who request not to receive telemarketing calls made by or on behalf of that person or entity. The procedures instituted must meet the following minimum standards:

(1) Written policy. Persons or entities making calls for telemarketing purposes must have a written policy, available upon demand, for maintaining a do-not-call list.

(2) Training of personnel engaged in telemarketing. Personnel engaged in any aspect of telemarketing must be informed and trained in the existence and use of the do-not-call list.

(3) Recording, disclosure of do-not-call requests. If a person or entity making a call for telemarketing purposes (or on whose behalf such a call is made) receives a request from a residential telephone subscriber not to receive calls from that person or entity, the person or entity must record the request and place the subscriber's name, if provided, and telephone number on the do-not-call list at the time the request is made. Persons or entities making calls for telemarketing purposes (or on whose behalf such calls are made) must honor a residential subscriber's do-not-call request within a reasonable time from the date such request is made. This period may not exceed thirty days from the date of such request. If

such requests are recorded or maintained by a party other than the person or entity on whose behalf the telemarketing call is made, the person or entity on whose behalf the telemarketing call is made will be liable for any failures to honor the do-not-call request. A person or entity making a call for telemarketing purposes must obtain a consumer's prior express permission to share or forward the consumer's request not to be called to a party other than the person or entity on whose behalf a telemarketing call is made or an affiliated entity.

(4) Identification of sellers and telemarketers. A person or entity making a call for telemarketing purposes must provide the called party with the name of the individual caller, the name of the person or entity on whose behalf the call is being made, and a telephone number or address at which the person or entity may be contacted. The telephone number provided may not be a 900 number or any other number for which charges exceed local or long distance transmission charges.

(5) Affiliated persons or entities. In the absence of a specific request by the subscriber to the contrary, a residential subscriber's do-not-call request shall apply to the particular business entity making the call (or on whose behalf a call is made), and will not apply to affiliated entities unless the consumer reasonably would expect them to be included given the identification of the caller and the product being advertised.

(6) Maintenance of do-not-call lists. A person or entity making calls for telemarketing purposes must maintain a record of a consumer's request not to receive further telemarketing calls. A do-not-call

request must be honored for 5 years from the time the request is made.

(7) Tax-exempt nonprofit organizations are not required to comply with 64.1200(d).

(e) The rules set forth in paragraph (c) and (d) of this section are applicable to any person or entity making telephone solicitations or telemarketing calls to wireless telephone numbers to the extent described in the Commission's Report and Order, CG Docket No. 02-278, FCC 03-153, "Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991."

(f) As used in this section:

(1) The terms automatic telephone dialing system and autodialer mean equipment which has the capacity to store or produce telephone numbers to be called using a random or sequential number generator and to dial such numbers.

(2) The term clear and conspicuous for purposes of paragraph (a)(3)(iii)(A) of this section means a notice that would be apparent to the reasonable consumer, separate and distinguishable from the advertising copy or other disclosures, and placed at either the top or bottom of the facsimile.

(3) The term emergency purposes means calls made necessary in any situation affecting the health and safety of consumers.

(4) The term established business relationship for purposes of telephone solicitations means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a residential subscriber with or without an exchange of consideration, on the basis of the subscriber's

purchase or transaction with the entity within the eighteen (18) months immediately preceding the date of the telephone call or on the basis of the subscriber's inquiry or application regarding products or services offered by the entity within the three months immediately preceding the date of the call, which relationship has not been previously terminated by either party.

(i) The subscriber's seller-specific do-not-call request, as set forth in paragraph (d)(3) of this section, terminates an established business relationship for purposes of telemarketing and telephone solicitation even if the subscriber continues to do business with the seller.

(ii) The subscriber's established business relationship with a particular business entity does not extend to affiliated entities unless the subscriber would reasonably expect them to be included given the nature and type of goods or services offered by the affiliate and the identity of the affiliate.

(5) The term established business relationship for purposes of paragraph (a)(3) of this section on the sending of facsimile advertisements means a prior or existing relationship formed by a voluntary two-way communication between a person or entity and a business or residential subscriber with or without an exchange of consideration, on the basis of an inquiry, application, purchase or transaction by the business or residential subscriber regarding products or services offered by such person or entity, which relationship has not been previously terminated by either party.

(6) The term facsimile broadcaster means a person or entity that transmits messages to telephone

facsimile machines on behalf of another person or entity for a fee.

(7) The term seller means the person or entity on whose behalf a telephone call or message is initiated for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(8) The term sender for purposes of paragraph (a)(3) of this section means the person or entity on whose behalf a facsimile unsolicited advertisement is sent or whose goods or services are advertised or promoted in the unsolicited advertisement.

(9) The term telemarketer means the person or entity that initiates a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(10) The term telemarketing means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person.

(11) The term telephone facsimile machine means equipment which has the capacity to transcribe text or images, or both, from paper into an electronic signal and to transmit that signal over a regular telephone line, or to transcribe text or images (or both) from an electronic signal received over a regular telephone line onto paper.

(12) The term telephone solicitation means the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is

transmitted to any person, but such term does not include a call or message:

(i) To any person with that person's prior express invitation or permission;

(ii) To any person with whom the caller has an established business relationship; or

(iii) By or on behalf of a tax-exempt nonprofit organization.

(13) The term unsolicited advertisement means any material advertising the commercial availability or quality of any property, goods, or services which is transmitted to any person without that person's prior express invitation or permission, in writing or otherwise.

(14) The term personal relationship means any family member, friend, or acquaintance of the telemarketer making the call.

(g) Beginning January 1, 2004, common carriers shall:

(1) When providing local exchange service, provide an annual notice, via an insert in the subscriber's bill, of the right to give or revoke a notification of an objection to receiving telephone solicitations pursuant to the national do-not-call database maintained by the federal government and the methods by which such rights may be exercised by the subscriber. The notice must be clear and conspicuous and include, at a minimum, the Internet address and toll-free number that residential telephone subscribers may use to register on the national database.

(2) When providing service to any person or entity for the purpose of making telephone solicitations, make a one-time notification to such person or entity

of the national do-not-call requirements, including, at a minimum, citation to 47 CFR 64.1200 and 16 CFR 310. Failure to receive such notification will not serve as a defense to any person or entity making telephone solicitations from violations of this section.

(h) The administrator of the national do-not-call registry that is maintained by the federal government shall make the telephone numbers in the database available to the States so that a State may use the telephone numbers that relate to such State as part of any database, list or listing system maintained by such State for the regulation of telephone solicitations.

HISTORY:

[57 FR 48335, Oct. 23, 1992; 57 FR 53293, Nov. 9, 1992; 60 FR 42069, Aug. 15, 1995; 68 FR 44144, 44177, July 25, 2003; 68 FR 50978, Aug. 25, 2003; 68 FR 56764, Oct. 1, 2003; 68 FR 59130, 59131, Oct. 14, 2003; 69 FR 60311, 60316, Oct. 8, 2004; 69 FR 62816, Oct. 28, 2004; 69 FR 78339, Dec. 30, 2004; 70 FR 19330, 19337, Apr. 13, 2005; 70 FR 37705, June 30, 2005; 70 FR 75070, Dec. 19, 2005; 71 FR 25967, 25977, May 3, 2006; 71 FR 42297, July 26, 2006; 71 FR 56893, Sept. 28, 2006; 71 FR 75122, Dec. 14, 2006]

APPENDIX K

Federal Communications Commission
Washington, D.C. 20554

January 26, 1998

Delegate Ronald A. Guns
House of Delegates
161 Lowe Office Building
Annapolis, Maryland 21401-1991

Dear Mr. Guns:

I am writing in response to your August 1, 1997, letter to Regina Keeney, former Chief, Common Carrier Bureau, requesting that the Commission clarify whether the State of Maryland may enact laws that would apply to all commercial telemarketing calls received within the State, only to those calls that originate within the State or only to wholly intrastate calls. You asked whether the Commission had considered adopting rules that would require telemarketers utilizing automated dialing systems to be on the telephone line and ready to respond to call recipients at the time the subscriber answers. Lastly, you asked whether the Commission has considered adopting a rule that would require telemarketers to inform call recipients that they had the option to be placed on a do-not-call list.

On December 20, 1991, Congress enacted the Telephone Consumer Protection Act of 1991 (TCPA), Public Law 102-243, which amended the Communications Act of 1934[1] by adding a new section 47 U.S.C. § 227. The TCPA mandated that the Commission implement regulations to protect the privacy rights of

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[1] 47 U.S.C. §§ 151 *et seq.* ("Communications Act" or "the Act").

citizens by restricting the use of the telephone network for unsolicited advertising. On September 17, 1992, the Commission adopted a *Report and Order* (CC Docket 92-90, FCC No. 92-443),[2] which established rules governing unwanted telephone solicitations and regulated the use of automatic telephone dialing systems, prerecorded or artificial voice messages, and telephone facsimile machines.

"Whether the state may impose requirements on interstate communications depends on an analysis under the Supremacy Clause of Article VI of the U.S. Constitution."[3] Under the Supremacy Clause, the state may not regulate conduct in an area of interstate commerce intended by the Congress for exclusive federal regulation.[4] The key inquiry is whether Congress intended to supplant state laws on the same subject."[5] Section 2(a)[6] of the Act grants the Commission jurisdiction over all interstate and foreign communications. Interstate communications are defined as communications or transmissions between points in different states.[7] Section 2(b)(1)[8] of the Act generally reserves to the states jurisdiction over

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[2] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Report and Order*, 7 FCC Rcd 8752 (1992) (*Report and Order*).

[3] *Operator Services Providers of America Petition for Expedited Declaratory Ruling, Memorandum Opinion and Order*, 6 FCC Rcd 4475, 4476 (1991) (*Operator Services Memorandum Opinion and Order*).

[4] *Id.*

[5] *Id.*

[6] 47 U.S.C. § 152(a).

[7] 47 U.S.C. § 153(22).

[8] 47 U.S.C. § 152(b)(1).

interstate communications.[9] Intrastate communications are defined as communications or transmissions between points within a state.[10]

The Communications Act, specifically section 227 of the Act, establishes Congress intent to provide for regulation exclusively by the Commission of the use of the interstate telephone network for unsolicited advertisements by facsimile or by telephone utilizing live solicitation, autodialers, or prerecorded messages. The TCPA also preempts state law where it conflicts with the technical and procedural requirements for identification of senders of telephone facsimile messages or automated artificial or prerecorded voice messages.[11] By its terms, the TCPA shall *not* "preempt any State law that imposes more restrictive intrastate requirements or regulations on, or which prohibits (A) the use of telephone facsimile machines or other electronic devises to send unsolicited advertisements; (B) the use of automatic telephone dialing systems; (C) the use of artificial or prerecorded voice messages; or (D) the making of telephone solicitations."[12]

In light of the provisions described above, Maryland can regulate and restrict intrastate commercial telemarketing calls. The Communications Act,

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[9] *Operator Services Memorandum Opinion and Order*, 6 FCC Rcd at 4476.

[10] Intrastate means remaining entirely within the boundaries of single state. NEWTON'S TELECOM DICTIONARY, 11th Edition, at 320. Intrastate telephone calls are calls that originate and are received within the boundaries of a single state.

[11] 47 U.S.C. § 227(d) and e(1); *see Report and Order*, 7 FCC Rcd at 8781.

[12] 47 U.S.C. § 227(e)(1); *see Report and Order*, 7 FCC Rcd at 8781.

however, precludes Maryland from regulating or restricting interstate commercial telemarketing calls. Therefore, Maryland can not apply its statutes to calls that are received in Maryland and originate in another state or calls that originate in Maryland and are received in another state.

In response to your second inquiry, the Commission stated that there are separate privacy concerns associated with artificial or prerecorded message solicitations as opposed to live solicitations, which include calls made by autodialers that deliver calls to live operators.[13] The Commission did not consider adopting rules that would require telemarketers utilizing automated dialing systems to be on the telephone line and immediately ready to respond to customers at the time of a call. No provision regarding this concern is reflected in the language of the TCPA. In addition, no comments or petitions suggesting such a requirement were filed before the Commission during the rulemaking proceeding implementing the TCPA. Nothing in our rules, however, would limit the state of Maryland from including this type of provision in its telemarketing statutes applicable to calls between points in the state of Maryland.

In its *Report and Order*, the Commission considered a number of options that proposed to place a variety of requirements upon telemarketers, including requiring telemarketers to inform subscribers of their right to be placed on do-not-call lists. Although the Commission selected the establishment of company-specific do-not-call lists as the most effective alternative to protect residential subscribers from

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[13] *Report and Order*, 7 FCC Rcd at 8756-57.

unwanted live solicitations, it did not requirement telemarketers to notify telephone subscribers of their right to be placed on do-not-call lists.[14] The Commission noted that it would disseminate public notices and work with consumer groups, industry associations, local telephone companies, and state agencies to ensure that consumers are fully informed of their rights under the TCPA. For example, the Commission released a public notice on January 11, 1993, a Consumer Alert in March 1995, and a Consumer News brochure in June 1997, explaining to consumers what actions they can take to reduce the number of unsolicited calls and facsimiles that they receive and detailing consumer rights under the TCPA, and the Commission's rules. No additional petitions have been filed requesting that the Commission require telemarketing companies to inform consumers of their right to be placed on the companies' do-not-call lists.

Enclosed is a copy of a Consumer News bulletin addressing consumer rights under the TCPA; a copy of the *Report and Order*, *Memorandum Opinion and Order*,[15] and *Order on Further Reconsideration*[16] published by the Commission implementing the TCPA; a copy of 47 C.F.R. § 64.1200, regulations implemented y the Commission regarding the TCPA; and a

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[14] *Report and Order*, 7 FCC Rcd at 8764-68.

[15] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Memorandum Opinion and Order*, 10 FCC Rcd 12391 (1995) (*Memorandum Opinion and Order*).

[16] Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, *Order on Ruther Reconsideration*, CC Docket 92-90, FCC 97-117 (rel. Apr. 10, 1997) (*Order on Further Reconsideration*)

copy of the TCPA. If you have further questions, please contact Renee Alexander at (202) 418-2497.

Sincerely,

Geraldine A. Matise
Chief, Network Services Division
Common Carrier Bureau

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SUPREME COURT, U.S.

Supreme Court of the United States

TSA STORES, INC.,

Petitioner,

v. No. 07-1163

FLORIDA DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

Respondent.

In Opposition to Petition for Writ of Certiorari to the Supreme Court of Florida

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES

The Florida Department of Agriculture and Consumer Services is a regulatory agency of the State of Florida and will be referred to as ("FLORIDA") except as otherwise noted within the text. Florida, was the Plaintiff in the trial court having sued **The Sports Authority, Florida, Inc.**, a Florida Corporation, which was later merged into TSA Stores, Inc.

CORPORATE DISCLOSURE STATEMENT

The Sports Authority, Florida, Inc., a Florida Corporation, should be added to the Corporate Disclosure Statement. Hereafter, all of the Sports Authority family of corporations will be referred to as ("The Sports Authority") or ("TSA"), except as otherwise noted within the text.

TABLE OF CONTENTS

	Page
PARTIES	iii
CORPORATE DISCLOSURE STATEMENT	iii
TABLE OF AUTHORITIES	vi
CITATIONS OF OPINIONS AND ORDERS BELOW	1
STATEMENT OF JURISDICTION	3
CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED	3
STATEMENT OF THE CASE	4
ARGUMENT: REASONS FOR DENYING THIS PETITION	5
INTRODUCTION	5
I. THE FLORIDA FIFTH DISTRICT COURT OF APPEAL HAS [NOT] RULED ON AN IMPORTANT QUESTION OF FEDERAL LAW NOT YET SETTLED BY THIS COURT	7
A. The intent of the United States Congress and FCC is [not] clear – [that] – interstate telephone calls are to be regulated solely by federal law.	7

The U.S. District Court For The Middle District of Florida ruled that Florida Statute 501.059 is *not completely preempted* by the Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA"). (Emphasis added). 7

B. This Court has ruled that the Telecommunications Act and the FCC can preempt state law as applied to interstate calls. 10

II. THE FLORIDA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS BY COURTS IN OTHER JURISDICTIONS. 11

A. The California, Ohio and Texas decisions cited by TSA appear inapposite to the foregoing Florida opinion,

B. Florida will not attempt to rebut those cases cited by TSA which appear to be in general agreement with the Florida Fifth District Court of Appeal.

III. [THERE IS NO] NEED FOR SUPREME COURT RESOLUTION 12

CONCLUSION 13

APPENDICES

All references to an appendix will be to the appendices to Petitioner's Petition For Writ of Certiorari, as follows: Pet.App. _.

TABLE OF AUTHORITIES

CASE	Page
AT&T Corp. v. Public Utilities Commission of Texas, 373 F.3d 641 (5th Cir. Ct. App., 2004).....	12
Black v. Financial Freedom Senior Funding Corp., 92 Cal. .App. 4th 917, 112 Cal.Rptr. 2d 452-53 (Cal Ct. App. 2001).....	6
Bravman v. Baxter Healthcare Corp., 842 F. Supp. 747, 753 (S.D. N.Y) 1994).....	13
California v. ARC Americal Corp. (1989) 490 U.S. 93, 101, 109 S. Ct, 104 L. Ed. 2d 86	6
Ginochio v. Surgikos, Inc., 864 F. Supp. 948, 951	13
Green v. Fund Asset Mgmt., L.P. 245 F.3d 214, 230 (3d Cir. 2001)	12
Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 255, 104 S. Ct. 616, 78 L. Ed.2d 443 (1984).....	12
Smiley v. Citibank (1995 ii Cal. 4th 138, 148), 44 Cal. Rptr 2d 441, 900 P.2d 690, aff'd (1996) 517 U.S. 735, 116 S. Ct. 1730, 135 L. Ed. 2d 25	6

TABLE OF AUTHORITIES -- Continued

State of Florida, Dep't of Agric. and Consumer Services v. The Sports Authority Florida, Inc. Case No. 6:04-cv-115-Orl-JGG, U.S. District Court, Middle District of Florida, App 31a. 7, 10, 11

State of Florida Dep't of Agriculture and Consumer Services v. The Sports Authority Florida, Inc. a Florida Corporation, Case No. 03-CA-10535, Circuit Court for Orange County, Florida, February 18, 2007. Pet.App. 3a. 5

TSA Stores, Inc. v. Dep't of Agric. and Consumer Services District Court of Appeal of the State of Florida, Fifth District Case No.: 5D06-1775 Pet.App. 13a. & 17a. 8, 10, 11

State of Florida Dep't of Agriculture and Consumer Services v. The Sports Authority Florida, Inc. a Florida Corporation, Case No. 03- CA-10535, Circuit Court for Orange County,Florida, April 11, 2006. 4

Rotunda, R. & Nowak, J., Treatise on Constitutional Law; Substance and Procedure, § 12(2d ed. 1992 & Supp. 1993). 13

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CITATIONS OF OPINIONS AND ORDERS BELOW

Final Judgment and Permanent Injunction After Remand—*State of Florida Dep't of Agriculture and Consumer Services v. The Sports Authority Florida, Inc. a Florida Corporation,* Case No. 03-CA-10535, Circuit Court for Orange County, Florida, February 18, 2007. Pet.App. 3a.

Order – *TSA Stores, Inc., etc. v. Florida Dep't of Agriculture and Consumer Services,* Case No.: SC07-1101, Supreme Court of Florida, December 13, 2007. Pet.App. 1a.

Order—*TSA Stores, Inc., a Delaware Corporation v. Dep't of Agriculture and Consumer Services,* District Court of Appeal of the State of Florida, Fifth District, Case No.: 5D06-1775, April 20, 2007. Pet.App. 7a.

Final Summary Judgment and Permanent Injunction - *State of Florida Dep't of Agriculture and Consumer Services v. The Sports Authority Florida, Inc. a Florida Corporation,* Case No. 03- CA-10535, Circuit Court for Orange County, Florida, April 11, 2006. Pet.App. 20a.

Order on Motion for Summary Judgment and Permanent Injunction *State of Florida, Dep't of Agric.and Consumer Services v. The Sports Authority Florida, Inc.*, Case No. 03-CA-10535, Circuit Court for Orange County, Florida, October 31, 2005. Pet.App. 25a.

Order - *State of Florida, Dep't of Agric. and Consumer Services v.* The Sports Authority Florida, Inc., Case No. 6:04-cv-115-Orl-JGG, U.S. District Court, Middle District of Florida, App 31a

STATEMENT OF JURISDICTION

The Florida Fifth District Court of Appeal decided this case based on sections 501.059(1)©3., and 501.059(7)(a), Florida Statutes. It: (i) decided that § 501.059(1)(c) 3. Fla. Stat. exempted persons who had made a purchase from The Sports Authority within the past 18 months from the definition of "unsolicited telephonic sales calls;" and (ii) stated "we need not reach the issue of whether the states have jurisdiction over automated calls originating out of state. The [Florida] statute covers this contingency."

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

U.S. Constitutional Provisions

(None to Respondents knowledge)

Statutes

Telephone Consumer Protection Act, 47 U.S.C. § 227. Pet.App. 44a.

Florida Statute § 501.059 Pet.App. 64a.

Regulations

47 C.F.R. § 64.1200. Pet.App. 73a.

STATEMENT OF THE CASE

Respondent disagrees with Petitioner's Statement of the Case in the following particulars.

The Sports Authority, Florida, Inc., a Florida Corporation having business locations in Florida was the entity that "knowingly allowed" the 73 telephonic sales calls (made by automated dialing machines that played prerecorded messages) that constituted violations of Florida Statute § 501.059(7)(a). The merger by which The Sports Authority, Florida, Inc. was absorbed into TSA Stores, Inc. did not occur until after the last of subject telephonic sales calls were "knowingly allow[ed]" and this lawsuit was filed.

Florida prosecuted the Sports Authority for: (i) *causing* the subject 77 "unsolicited telephonic sales calls" that were alleged as violations of § 501.059(4) Fla. Stat.; and (ii) *knowingly allow[ing]* the 73 pre-recorded "telephonic sales calls" that were made using automated dialing machines in violations of § 501.059(7)(a) Fla. Stat. See, State of Florida Dep't of Agriculture and *Consumer Services v.The Sports Authority Florida, Inc. a Florida Corporation,* Case No. 03- CA-10535, Circuit Court for Orange County, Florida, April 11, 2006. The Florida Fifth District Court of Appeal stated ". . .we need not reach the issue of whether the states have jurisdiction over automated calls originating out of state. The [Florida] statute covers this contingency." Pet.App. 17a.

The Florida Fifth District Court of Appeal reversed the 77 violations of Florida Statute § 501.059(4) based upon the "safe haven" clause

contained in Florida Statute § 501.059(1)© 3. The Sports Authority prevailed based solely upon the State Court's interpretation of state law. The Florida trial Court later entered its Final Judgment and Permanent Injunction After Remand. *State of Florida Dep't of Agriculture and Consumer Services v. The Sports Authority Florida, Inc. a Florida Corporation*, Case No. 03-CA-10535, Circuit Court for Orange County, Florida, February 18, 2007. Pet.App. 3a

ARGUMENT: REASONS FOR DENYING THIS PETITION

Introduction

The Department of Agriculture and Consumer Services, ("Florida") is a state regulatory agency and the enforcing authority of Section 501.059, Florida Statutes. Florida, pursuant to Section 501.059(3), Florida Statutes maintains a list of telephone numbers of consumers that do not want to receive telephone sales calls from telephone solicitors or telemarketers. These consumers pay Florida an annual fee to have their telephone number appear on the "no sales solicitation call" list. The No-Sales Statute §501.059(4), Fla. Stat. makes it unlawful to make, or *cause* to be made, unsolicited telephonic sales calls to persons whose numbers appear on the list published by Florida, which list incorporates the federal do-not-call list.[1] Further, Section

[1] 47 United States Code § 227 (3) (J) & (K).

501.059(7)(a) Florida Statutes makes it unlawful for a telemarketer to make or *knowingly allow* a telephonic sales call and use an automated dialing system for the selection and dialing of telephone numbers or playing a recorded message when the number called is answered. § 501.059 Fla. Stat. is an integral part of Florida's consumer protection law.

> Laws concerning consumer protection, including laws prohibiting false advertising and unfair business practices, are included with *the states' police power*, and are thus subject to this heightened presumption against preemption. (*See California v. ARC Americal Corp.* (1989) 490 U.S. 93, 101, 109 S. Ct. 1661, 104 L.Ed. 2d 86 [unfair business practices]; *Smiley v. Citibank* (1995 11 Cal. 4th 138, 148, 44 Cal. Rptr 2d 441, 900 P.2d 690 [consumer protection], aff'd. (1996) 517 U.S. 735, 116 S. Ct. 1730, 135 L. Ed. 2d 25 ....

Black v. Financial Freedom Senior Funding Corp., 92 Cal. App. 4th 917, 112 Cal. Rptr. 2d 445, 452-53 (Cal Ct App. 2001).

Florida received complaints from numerous consumers that The Sports Authority, Florida, Inc. ("TSA"), was violating Florida's statutes by making, or *causing* to be made, unsolicited telephonic sales calls to such consumers whose phone numbers were on the state's no sales solicitation call list; and playing, causing, or *knowingly allowing* to be played recorded messages when the numbers called were answered. After each consumer complaint, Florida sent a letter to TSA together with a copy of the consumer's complaint and a copy of Florida's statute.

TSA failed to comply with Florida law. Suit was filed seeking an injunction and civil penalty. TSA filed a Petition For Removal to the United States District Court for the Middle District of Florida alleging that Florida's law was preempted by 47 U.S.C. §227. The United States District Court entered an Order of Remand finding that Florida's law was not completely preempted by 47 U.S.C. §227. See, *State of Florida, Department of Agriculture and Consumer Services, v. The Sports Authority Florida, Inc.*, Case No. 6:04-cv-115-Orl-JGG, U.S. District Court, Middle District of Florida. Pet.App. 31a. TSA seeks to have this Court declare that Florida's statute is preempted by Federal Law. The relief sought by TSA would allow a telemarketer to make, *cause* or *knowingly allow* telemarketing calls to Florida consumers and the playing of a recorded message when the number called is answered, in violation of Florida law.

I. THE FLORIDA FIFTH DISTRICT COURT OF APPEAL HAS [NOT] RULED ON AN IMPORTANT QUESTION OF FEDERAL LAW NOT YET SETTLED BY THIS COURT

A. The intent of the United States Congress and FCC is [not] clear – [that] – interstate telephone calls are to be regulated solely by federal law.

The U.S. District Court For The Middle District of Florida ruled that Florida Statute 501.059 is not ***completely preempted*** by the

> **Telephone Consumer Protection Act, 47 U.S.C. §227 ("TCPA"). (Emphasis added).**

Section 501.059, Florida Statutes is not preempted by the TCPA or included within its contemplation. The TCPA defines "telephone solicitation" as the initiation of a telephone call. The TCPA also provides that it is unlawful to initiate or make telephone solicitations to persons whose names appear on the federal do-not-call list. Florida law differs from the TCPA. Section 501.059(4), Florida Statutes, provides:

> "No telephone solicitor shall make ***or cause*** to be made any unsolicited telephonic sales call to any residential, mobile or telephonic paging device telephone number, if the number for that telephone appears in the then-current quarterly listing published by the Florida." [Emphasis added].

Also, section 501.059(7), Florida Statutes, provides:

> "No person shall make ***or knowingly allow*** a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to the number called." [Emphasis added]. Neither **causing** a call to be made, nor **knowingly allowing** an automated dialing system that plays a recorded message is preempted by the TCPA.[2]

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[2] See, *TSA Stores, Inc. v. Department of Agriculture and Consumer Services*, Case No. 5D06-1775 (Fla. 5th DCA 2007), *infra*. Pet.App. 13a and 17a,

Florida's action against TSA is for **causing** unsolicited telephonic sales calls, and for **knowingly allowing** recorded messages to be played by telephonic sales calls. The entity actually making the calls—and the entity **causing** or **knowingly allowing** the calls to be made—may be separate entities. Here, a Florida corporation hired (**causation**) a California company to make calls to Florida consumers. Florida's statute is violated by the Florida Corporation if the California caller does not follow Florida law in the manner such calls are made. Assuming *arguendo* (and Florida does not agree with the argument) that initiation of a telephonic sales call from across state lines requires preemption. But, **causing** – or **knowingly allowing**— the call to be made is an activity not contemplated by the TCPA and is properly regulated by the Florida statute. **Causing** or **knowingly allowing** a call can be done through business practices such as hiring out-of-State telemarketers, thus setting in motion practices that knowingly allow playing a recorded message when the number called is answered. TSA: having (i) ***caused*** calls to be made to Floridians whose numbers appear on Florida's do not call list, and (ii) ***knowingly allowed*** playing of prerecorded messages when Florida consumers' numbers are answered, are activities done in Florida, separate and apart from the making of the phone calls from across the state line.

> [TSA] essentially argues that the federal statute has preempted state laws governing the regulation of unsolicited sales calls and the improper use of prerecorded messages claims. Yet the TCPA specifically disclaims a complete preemption in these areas. *See Fla. Dep't of Agric. & Consumer Servs. v. The Sports Authority Fla., Inc.* Case No. 6:04-cv-115-Orl-JGG, 2004 U.S. Dist. LEXIS 29646, at *9 (M.D. Fla. June 4, 2004). Thus, the TCPA carries no implication in its language that Congress had intended to preempt state law in this regard.
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> * * * *
>
> [TSA] suggests, in essence, that the Florida statute might be fully avoided by the simple expedient of taking the automated call machine to a different state, and having the calls to Florida consumers made [from] there. Because of the language of the Florida statute, however, we need not reach the issue of whether the states have jurisdiction over automated calls originating out of state. The statute covers this contingency. . . .

TSA Stores, Inc. v. Department of Agriculture and Consumer Services, Case No. 5D06-1775 (Fla. 5th DCA 2007). Pet.App. 13a, and 17a.

B. This Court has ruled that the Telecommunications Act and the FCC can preempt state law as applied to interstate calls.

Florida answers this assertion by reference to the argument in Part A., above, and more particularly the excerpts from the opinion of the Florida Fifth District Court of Appeal quoted in the paragraphs next above.

II. THE FLORIDA SUPREME COURT'S DECISION CONFLICTS WITH DECISIONS BY COURTS IN OTHER JURISDICTIONS.

TSA's assertion begs the Question: Whether a decision by the highest state Court—based solely on its interpretation of a general State law more restrictive than the federal law—is preempted by that same federal law that disclaims preemption:

> [n]othing in the TCPA was to be construed to prohibit the State "from proceeding in State court on the basis of an alleged violation of any general or criminal statute of such State."

TSA Stores, Inc. v. Department of Agriculture and Consumer Services, supra. Pet.App. 17a.

A. The California, Ohio and Texas decisions cited by TSA appear inapposite to the foregoing Florida opinion, and with that of the U.S District Court, M.D. of Florida in *State of Florida, Department of Agriculture and Consumer Services, v. The Sports Authority Florida, Inc., supra,.*

B. and C. Florida will not attempt to rebut those cases cited by TSA which appear to be in general agreement with the Florida Fifth District Court of Appeal. However, we note that TSA has not in its Petition analyzed the impact of relevant state law on those decisions, as did the Florida court in the case *sub judice.*

III. [THERE IS NO] NEED FOR U.S. SUPREME COURT RESOLUTION

Florida agrees with TSA's analysis of the U.S. District Court's Order of Remand in *State of Florida, Department of Agriculture and Consumer Services, v. The Sports Authority Florida, Inc., supra.* Yet, Florida disagrees that a decision of national uniformity by this Court is necessary to avoid frustrating the purpose of the TCPA. Contrary to TSA's argument, Congress enacted the TCPA to broaden State authority, not supplant State law. The burden in preemption cases is upon the party seeking to preempt a state's law. The case of *AT&T Corp., v. Public Utilities Commission of Texas,* 373 F.3d 641 (5th Cir Ct. 2004) stated:

> "The burden of persuasion in preemption cases lies with the party seeking annulment of the state statute. *Green v. Fund Asset Mgmt., L.P.,* 245 F.3d 214, 230 (3d Cir. 2001) ("Finally, we note that the party claiming preemption bears the burden of demonstrating that federal law preempts state law." (citing *Silkwood v. Kerr-McGee Corp.,* 464 U.S. 238, 255, 104 S.Ct. 616, 78 L. Ed.2d 443 (1984))."

TSA has failed to meet its burden. Mere inconvenience in complying with state law is not grounds to have the state's law preempted. Preemption is not inferred nor granted by implication.

There is no conflict preemption. Conflict preemption occurs where compliance with both federal and state laws is impossible. If it is possible to comply with both federal and state law, there is neither conflict nor a frustration of purpose. See generally, Rotunda, R. & Nowak, J., Treatise on Constitutional Law; Substance and Procedure, § 12 (2d ed. 1992 & Supp. 1993)." *Bravman v. Baxter Healthcare Corp.*, 842 F. Supp. 747, 753 (S.D. N.Y. 1994; *see also Ginochio v. Surgikos Inc.*, 864 F. Supp. 948, 951 (same). It is possible for TSA to comply with both laws simply by following the Florida law. Doing so does not violate any part of the TCPA.

TSA could have pursued an appeal of the U.S. District Court's Remand directly to the Eleventh Circuit. TSA elected to defend the allegations it violated State law in the State Court. Having prevailed on 77 counts upon the State Court's interpretation of State law TSA should not now be heard to complain that that very law should be preempted.

CONCLUSION

For the reasons stated herein TSA's Petition for Certiorari should be denied (1) because Florida's law is not preempted by the TCPA; or (2) because the issue of complete preemption has already been decided by the United States District Court for the Middle District of Florida pursuant to TSA's election of remedies.

Respectfully submitted,

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